(21,500.)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1910.**

## No. 141.

ARTHUR BRISCOE, APPELLANT,

*vs.*

HENRY B. F. MACFARLAND, HENRY L. WEST, AND JAY J. MORROW, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND THE DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

No. 1886.

ARTHUR BRISCOE, Appellant,
vs.
HENRY B. F. MACFARLAND et al.

Supreme Court of the District of Columbia.

Equity. No. 23239.

ARTHUR BRISCOE, Complainant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and JAY J. MORROW, Commissioners of the District of Columbia, and The District of Columbia, Defendants.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to-wit:—

*Bill.*

Filed April 14, 1902.

In the Supreme Court of the District of Columbia.

Equity. No. 23239.

ARTHUR BRISCOE, Complainant,
vs.
HENRY B. MACFARLAND, JOHN W. ROSS, and JOHN BIDDLE, Commissioners of the District of Columbia, and The District of Columbia, Defendants.

To the Supreme Court of the District of Columbia:

The Complainant, Arthur Briscoe, brings this his bill of complaint against the above named defendants, and thereupon he avers and shows:

2 1. That he is a citizen of the United States and a resident of the District of Columbia, and brings this bill in his own right.

2. That defendants Macfarland, Ross and Biddle are sued as Commissioners of the District of Columbia, and the District of Co-

lumbia, the other defendant, a municipal corporation, is sued in its own right.

3. That complainant is seized and possessed of lot numbered fifteen (15), in Block numbered seven (7), in the subdivision of a tract of land in the District of Columbia known as "Bloomingdale," the same being the northwest corner lot of said block.

4. That heretofore, to-wit, on or about the 8th day of March, A. D. 1899, the said Commissioners of the District of Columbia filed a petition in this Honorable Court, in a certain cause numbered 544 on the dockets of the District Court, asking that a jury of seven disinterested, judicious men be summoned to assess the damages, if any, which each owner of land might sustain by reason of a proposed extension of Rhode Island Avenue, the same being one of the public streets or thoroughfares of the City of Washington, in said District. A jury of seven men was subsequently summoned in accordance with the prayer of said petition, and thereafter other proceedings were had and taken in said cause Number 544, which will hereinafter be more particularly referred to. The said proceedings were instituted under and in accordance with an Act of Congress, approved February 10, 1899, entitled "An Act to extend Rhode Island Avenue."

5. That no actual notice was given this complainant of the pendency of said proceedings, and there was, therefore, no appearance in his behalf before said jury during said proceedings.

6. That thereafter, to-wit, on or about the 1st day of December, 1899, the said jury filed an alleged verdict in said cause No. 544, wherein an assessment of $1000, as for benefits supposed to have resulted from the proposed extension of said Avenue, is attempted to be imposed upon the said lot of this complainant, together with interest thereon at four per cent. per annum from the 6th day of February, 1900.

7. That thereafter, to-wit, on the 2d day of January, 1900, a rule was issued in said cause, directing this complainant and others to show cause, if any he or they had, why said alleged verdict should not be confirmed. Said rule was called to the attention of this complainant, not by any direct personal service of notice, but, as he now remembers, by some friend who had seen an advertisement thereof in one of the city papers. In response to said rule this complainant filed in said cause an answer objecting to said verdict, and asking that the same be vacated and set aside, as will appear on reference had to a copy of said answer, herewith filed, marked "Exhibit A. B. No. 1," which it is prayed may be read at the hearing of this cause and taken and considered a part hereof.

8. That, as the record and proceedings in said cause disclose, other owners of lands affected by said verdict indicated their dissatisfaction therewith, and filed in the cause exceptions thereto.

3 And this complainant is advised by counsel and believes, and so believing charges and avers, that immediately upon the filing of said objections, the said verdict of the jury of seven became and was inoperative for any p[u]rpose, and that no further or other proceedings could lawfully be had in the cause except upon and

after the summoning of a jury of twelve. And complainant is advised and therefore charges that any assessments as for benefits against his said lot, predicated of the verdict of the jury of seven, is invalid, and void.

9. The complainant further charges that said alleged assessment against his lot was made under the provisions of Sections 3 and 5 of said Act, which provide respectively as follows:

"SEC. 3. That of the amount found due and awarded as damages for and in respect of the land condemned under this act for the extending of said Avenue, one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground situate and lying on each side of said Rhode Island Avenue extended between Florida avenue, Maple avenue, Linden Street and Le Droit Avenue; and also those contained in squares eighteen and nineteen and the south half of square twenty in the recorded addition to Le Droit Park; and also those contained in blocks one and two, and the northwest corner lot of block seven in the subdivision known and designated as Bloomingdale; and also against so much of that tract of land known and designated as the David Moore tract as lies west of North Capitol Street."

"SEC. 5. That when confirmed by the court, the assessments made as aforesaid shall severally be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia have been collected since February twentieth, eighteen hundred and seventy one, and shall be payable in five equal installments, with interest at the rate of four per centum per annum until paid."

And complainant is advised by counsel and therefore charges that said alleged assessment is invalid and void, because the said Section 5 does not, nor does any other section or part of said act, provide when the said installments shall be payable, or from what date interest thereon shall be computed.

10. That the said alleged assessment, as the same appears on the tax records of defendant corporation, casts a cloud upon the title of this complainant to the lot so sought to be assessed, and prevents him from selling, or borrowing money upon the security of, said land.

11. That complainant has called the attention of the proper authorities of defendant corporation to the invalidity of said assessment, and has requested that no attempt be made to enforce collection thereof until after its status had been judicially ascertained and determined. But said authorities declined to accede to complainant's said request, and on the 12th day of April, 1902 stated that a sale of said lot for the payment in full of said assessment would shortly be made an advertisement thereof previously published by said Commissioners.

12. That the said commissioners have advertised said lot for sale, because of the nonpayment of the said alleged assessment, together with many other pieces or parcels of land similarly affected, at a public sale which commenced on the 8th day of April, 1902, and to continue from day to day until all said property, and other advertised for sale for nonpayment of taxes has been sold.

13. That the advertisement of complainant's said lot appears on page 80 of the pamphlet advertisement of said tax sales, as follows:

"Briscoe, Arthur.

Bloomingdale, block 7, lot 15, and improvements.

| | |
|---|---|
| Assessment for extension Rhode Island Avenue, | $1000.00 |
| Interest from Feb. 6, 1900 | 86.85 |
| Assessment for curb | 65.38 |
| Interest from Nov. 12, 1901 | 2.12 |
| Assessment for sidewalk | 67.28 |
| Interest from December 20, 1901 | 1.61 |
| Advertisement | .50 |
| | 1223.74 |

Said assessments for curb and sidewalk were paid in full with interest by the complainant on the 27th day of March 1902.

14. That said advertisement further and seriously clouds the title of complainant to his said lot, and should the same be sold, complainant's title would be still further complicated by the intervention of third persons claiming under such sale and a purchase thereat.

15. That the invalidity of said alleged assessment does not appear upon the face of said tax records, but depends upon judicial investigation and decision, whereas a deed given a purchaser of said lot at such tax sale would, under the Statute in such case provided, be *prima facie* evidence in favor of the grantee therein named of all antecedent proceedings in connection with the assessment of said tax.

16. That he is advised by counsel that however the provisions of said Section 5 of the aforesaid act may be construed, by no possible construction can it properly be held that the whole amount of said alleged assessment is now due, and that the defendant Commissioners are in any view of the case without power at this time to demand present payment of the whole amount of said alleged assessment, or to advertise said lot for sale as for default in such payment.

17. That the complainant is further advised by counsel that the said law under which the aforesaid proceedings were had and taken is unconstitutional and void because the prescribed assessments are not uniform and equal throughout the taxing district, and that any enforcement thereof will be in effect a taking of this complainant's property without due process of law.

18. Complainant further shows that he is in possession of said lot numbered 15 so attempted to be assessed, and is therefore unable to resort to any proceeding at law to dispel the clouds so cast upon his title.

5 Wherefore, and being without remedy in the premises save in this Honorable Court where such matters are properly cognizable, the complainant

*Prays*

1. That Henry B. Macfarland, John W. Ross and John Biddle, as commissioners as aforesaid, and the District of Columbia, a municipal corporation as aforesaid, may be made parties defendant to this bill, and duly served with process, requiring them and each of them to be and appear in this Court, in person or by counsel, by some certain day to be in said process named, to answer the foregoing bill of complaint and abide by and perform such order as may be passed herein.

2. That the defendant corporation, the District of Columbia, its said commissioners, and their agents and servants may be temporarily and perpetually enjoined and restrained from selling said lot 15, block seven, Bloomingdale, the property of this defendant, under the advertisement in said bill mentioned and described.

3. That the said alleged assessment as for supposed benefits so as aforesaid made against the said lot of this complainant, be declared to be invalid and void.

4. That the said defendants be decreed to cancel the said alleged assessment on the tax records of defendant corporation, in their custody, and perpetually enjoined from referring thereto in any tax certificate to be hereafter issued by them in respect of said lot.

That complainant may have such further and other relief as the nature of the case may require and to the court may seem fit.

And complainant will ever pray, &c.

ARTHUR BRISCOE.

SAM'L MADDOX,
*Solicitor for Complainant.*

DISTRICT OF COLUMBIA, *sct:*

Before me, the undersigned, personally appeared Arthur Briscoe, who, being by me first duly sworn, deposes and says:

That he has read over the foregoing bill of complaint by him subscribed and knows the contents thereof; that the matters and things therein alleged as of his own knowledge are true, and the matters and things therein alleged on information and belief he believes to be true.

ARTHUR BRISCOE.

Sworn to before me and subscribed in my presence this 14th day of April, A. D., 1902.

H. PRESCOTT GATLEY,
[SEAL.] *Notary Public.*

6 *Restraining Order.*

Filed April 14, 1902.

In the Supreme Court of the District of Columbia.

Equity. No. 23239.

ARTHUR BRISCOE, Complainant,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN BIDDLE, Commissioners of the District of Columbia, and The District of Columbia, Defendant.

Upon consideration of the bill in this cause filed, it is, this 14th day of April, A. D., 1902, adjudged and ordered that the defendant corporation, the District of Columbia, its commissioners, agents and servants be, and they are hereby enjoined, as prayed in the bill, from selling or offering for sale lot numbered fifteen (15), in block numbered seven (7), in the subdivision of a tract of land in the District of Columbia known as "Bloomingdale," the same being the northwest corner of said lot, in accordance with their pending advertisement of such proposed sale, as for nonpayment of assessments of benefits from the extension of Rhode Island Avenue, until the further order of the court to be made, if at all, after a hearing of the matters involved, which is set for the 23rd day of April, 1902, of which the defendants will take notice. This order to become operative upon compliance by the complainant with Equity rule 42.

By the Court:

A. C. BRADLEY, *Justice.*

*Marshal's Return.*

Served copy of within order on defendants by service on John W. Ross, one of the Commissioners of the District of Columbia.

April 14, 1902.

AULICK PALMER, *Marshal.*
S.

*Demurrer.*

Filed May 7, 1902.

In the Supreme Court of the District of Columbia.

Equity. No. 23239.

ARTHUR BRISCOE, Complainant,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN BIDDLE, Commissioners of the District of Columbia, and The District of Columbia, Defendants.

The defendants, The District of Columbia, and Henry B. F. Macfarland, John W. Ross, and John Biddle, Commissioners of
7 the District of Columbia, say that the complainant has not stated in his Bill of Complaint, filed herein, such a case as entitles him to the relief therein prayed, or to any other relief against these defendants, or any of them.

And these defendants further say that the complainant has not filed with his said Bill the records and proceedings in cause No. 544, of the District Court Docket of this Honorable Court, mentioned and referred to in said Bill.

Wherefore, the defendants demand the judgment of the Court, whether they shall make further answer to said Bill, and pray to be hence dismissed with their costs.

HENRY B. F. MACFARLAND,
JOHN W. ROSS,
JOHN BIDDLE,
*Commissioners of the District of Columbia.*

DISTRICT OF COLUMBIA, *ss:*

Personally appears Henry B. F. Macfarland, who, being duly sworn, says: That he is the President of the Board of Commissioners of the District of Columbia; that he has read the foregoing demurrer and that the same is not interposed for delay.

HENRY B. F. MACFARLAND.

Subscribed and sworn to before me, this 22nd day of April, A. D. 1902.

[SEAL.] WILLIAM TINDALL,
*Notary Public.*

I hereby certify that the foregoing demurrer is well founded in law, in my opinion.

A. B. DUVALL,
*Solicitor for the Defendants.*

*Joinder of Issue.*

Filed October 12, 1903.

In the Supreme Court of the District of Columbia.

In Equity. No. 23239.

ARTHUR BRISCOE
vs.
HENRY B. F. MACFARLAND et al., Commissioners of the District of Columbia.

The plaintiff hereby joins issue on the answer of the defendants now as for June 17, 1903.

SAM'L MADDOX,
*Attorney for Plaintiff.*

8 *Answer.*

Filed June 15, 1903. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

In Equity. No. 23239.

ARTHUR BRISCOE
vs.
HENRY B. F. MACFARLAND et al., Commissioners D. C., and THE DISTRICT OF COLUMBIA.

*The Joint Answer of the Defendants to the Bill of Complaint Exhibited Against Them by the Complainant Herein.*

1. These defendants admit the allegations of paragraph one of the complainant's bill relating to the citizenship and residence of complainant.

2. These defendants admit that at the time of the institution of this suit the defendants named in the second paragraph of complainant's bill were the Commissioners of the District of Columbia, but they aver that since the commencement of said suit the defendant John W. Ross departed this life, and that the defendant Harry L. West has been appointed and has duly qualified as the successor to the said defendant Ross.

3. These defendants admit the allegations of paragraph three of complainant's bill relating to complainant's seizen and possession of the premises therein described.

4. These defendants admit the allegations of paragraph four of complainant's bill relating to the institution of proceedings in cause No. 544 District Court Docket.

5. Answering the allegations of paragraph five of complainant's bill these defendants say that after filing their petition in said cause No. 544 District Court Docket public notice was given, pursuant to an order of the Court passed in said cause, by advertisement in The Washington Law Reporter, The Washington Post, and The Evening Star, newspapers published in the City of Washington, District of Columbia, of the pendency of said proceedings, and requiring that all parties interested should appear in Court and answer said petition on the day in said notice, a copy of which order is attached hereto and marked "Exhibit No. 1;" that on the 31st day of March, 1899, proof of such publication was duly made; that on the 16th day of December, 1899, Richard A. Ford and Frank M. Church entered their appearance in said cause on behalf of complainant, the same being in writing and in the words following:

"The Clerk will please enter our appearance in the above entitled "cause for Arthur Briscoe, owner of certain of the property assessed "by the verdict of the jury in said cause.

(Signed) RICHARD A. FORD,
(Signed) FRANK M. CHURCH,
*Attorneys for Arthur Briscoe."*

9 6. These defendants admit that on or about the first day of December, 1899, the jury empaneled in said cause No. 544 District Court filed their verdict in said cause whereby they assessed the property of complainant mentioned in said bill in the sum of $1,000 which verdict, so far as it relates to the property of the complainant is in the following words, viz:

"In the Supreme Court of the District of Columbia, Holding a District Court for Said District.

"In re The Extension of Rhode Island Avenue.

"We, the jury in the above entitled cause, hereby find the following verdict and award of damages, for and in respect of the land condemned and taken necessary for the extension of Rhode Island Avenue from Florida Avenue to Le Droit Avenue, as shown on the plat or map filed with the petition herewith, as set forth in Schedule 1, hereto annexed, as part hereof. And we, the jury aforesaid, in accordance with the act of Congress approved February 10, 1899, for the extension of said avenue, do hereby assess the sum of $48,308.50 being one-half of the damages so as aforesaid awarded in Schedule 1, against those pieces or parcels of ground situate and lying on each side of said Rhode Island Avenue extended; between Florida Avenue, Maple Avenue, Linden Street, and Le Droit Avenue; and also those contained in squares eighteen (18) and nineteen (19) and the south half of square twenty (20) in the recorded addition to Le Droit Park; and also those contained in blocks one (1) and two (2), and the northwest corner *of* lot of block seven (7) in the subdivision

known and designated as Bloomingdale; and also against so much of that tract of land known and designated as the David Moore tract as lies west of North Capitol Street, which we find will be benefitted by the extension of said Rhode Island Avenue, as set forth in Schedule 2, hereto annexed, as part hereof."

"As Witness our hands and seals this twenty-eighth day of November, A. D. 1899.

| | | |
|---|---|---|
| (Signed) | A. D. HAZEN. | [SEAL.] |
| " | EDWARD GRAVES. | [SEAL.] |
| " | JAS. F. OYSTER. | [SEAL.] |
| " | HARRY B. PARKER. | [SEAL.] |
| " | JOHN MITCHELL. | [SEAL.] |
| " | WM. J. WILSON. | [SEAL.] |
| " | LOUIS BEHRENS." | [SEAL.] |

* * * * * * *

"SCHEDULE No. 2.

*"Assessment of Benefits for the Extension of Rhode Island Avenue.*

| "Description of piece or parcel of land benefited. | Name of owner. | Benefits. |
|---|---|---|
| * * * * | * * | * |
| "Lot 15, Block 7, Bloomingdale subdivision. | Arthur Briscoe.... | $1,000.00 |
| * * * * | * * | * |

10 "UNITED STATES MARSHAL'S OFFICE,
"WASHINGTON, D. C., *Dec. 1st*, 1899.

"I hereby certify that the above inquisition is taken in conformity to the statute in such cases made and provided.

(Signed) AULICK PALMER,
*United States Marshal, District of Columbia."*

Defendants further answering said paragraph six deny that by the verdict of the jury any interest was charged upon said assessment, but they aver that the payment of the said assessment and the interest on deferred payments thereof is provided for by law.

7. Answering the allegations contained in paragraph seven of complainant's bill these defendants admit that on the second day of January, 1900, a rule *nisi* was issued in said cause No. 544 District Court directing the complainant to show cause, if any he had, why said verdict should not be confirmed, which rule in so far as it relates to complainant's said property is as follows:

"In the Supreme Court of the District of Columbia, Holding a District Court for said District.

"In re THE EXTENSION OF RHODE ISLAND AVENUE. No. 544.

"It appearing to the Court that on 1st day of December, A. D. 1899, there was filed herein the verdict and award of the jury summoned by the Marshal under the order heretofore passed herein to ascertain and award the damages which each owner of land may sustain for and in respect of the land condemned and taken for the extension of Rhode Island Avenue from Florida Avenue to Le Droit Avenue, as shown on the plat or map filed herein with the petition of the Commissioners of the District of Columbia; and to assess one-half of the amount found due and awarded as damages for and in respect of the land condemned for the extension of said Rhole Island Avenue, against those pieces or parcels of ground situate and lying on each side of said Rhode Island Avenue extended, between Florida Avenue, Mable Avenue, Linden Street, and Le Droit Avenue; and also those contained in squares eighteen (18) and nineteen (19) and the south half of square twenty (20) in the recorded addition to Le Droit Park; and also those contained in blocks one (1) and two (2), and the northwest corner lot of block seven (7) in the subdivision known and designated as Bloomingdale; and also against so much of that tract of land known and designated as the David Moore tract as lies west of North Capitol Street, which will be benefited by said extension of said Rhode Island Avenue; that in and by said verdict said jury had found due and awarded as and for damages for and in respect of the land condemned herein, shown on the aforesaid plat or map, as follows: * * * And that in and by said verdict said jury has assessed one-half of the aforesaid amount found due and awarded as and for damages against the following pieces or parcels of land shown on the plat or map annexed to the petition in this cause as follows: * * * "Against Lot 15, Block 7, Bloomingdale subdivision, Arthur Briscoe, owner, one thousand dollars ($1,000). It is this 2nd day of January, 1900, upon motion of counsel for the Commissioners of the District of Columbia, ordered: that the aforesaid verdict, award and assessment of said jury in all respects be, and the same is hereby confirmed unless cause to the contrary is shown on or before the 18th day of January, A. D. 1900; provided a copy of this order be published once in The Washington Law Reporter, and twice in The Evening Star before said last named date; and it is further ordered that the Marshal serve a copy of this order personally on the owners of land condemned and the owners of land assessed in said verdict with the one-half of the damages awarded therein, who may be found within the District of Columbia and if not found therein then by mailing a copy thereof to the place of abode or last known place of residence of such owner or owners.

(Signed) "A. B. HAGNER, *Justice.*"

Further answering said paragraph seven these defendants say that a copy of the foregoing order was served upon complainant in person by the United States Marshal upon the 8th day of January, 1900.

And defendants further aver that the said rule passed as aforesaid by the Court was published in The Washington Law Reporter and The Evening Star, newspapers published in the City of Washington, District of Columbia; these defendants admit that the complainant filed in said cause an answer objecting to said verdict, and that the "Exhibit A. B. No. 2," is a true copy of said objection.

8. Answering the allegations of paragraph eight of complainant's bill these defendants, admitting that the complainant and other owners of land affected by said verdict filed objections similar to those filed by the complainant as alleged in paragraph seven of complainant's bill, they aver that said objections were filed in response to the order *nisi* above referred to, and that the same were presented to the Court and argued by counsel, and a full hearing thereof had, and that, after such hearing and on or about the 27th day of January, 1900, the Court overruled all of said objections and finally ratified and confirmed the verdict, award and assessment of the jury filed as aforesaid.

And defendants further answering said paragraph say that neither the complainant nor any other owner of property affected by the said verdict, award and assessment of the jury, either before or after the said order *nisi*, up to the time the said verdict was finally confirmed by the Court, expressed any dissatisfaction with the said verdict of the jury other than by filing said written objections; that neither the complainant nor any other party interested, in his or their objections filed as aforesaid demanded or requested that a jury of twelve be summoned in accordance with the provisions of section 263 of the Revised Statutes of the United States relating to the District of Columbia; that no demand or request was ever made upon or to the Commissioners of the District of Columbia to cause a jury of twelve to be empaneled under the provisions of section 263 of the Revised Statutes relating to the District of Columbia, nor was such demand or request ever made upon or to the Court having jurisdiction of said cause No. 544 District Court and the defendants further say that the attention of the said Court was

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never called to the matter either orally or in writing, nor was the right of the complainant to a hearing before a jury of twelve under said section 263 of the Revised Statutes relating to the District of Columbia ever passed upon by the Court in said cause: that complainant and all other persons objecting as aforesaid to said verdict of the jury of seven based their objections upon grounds specifically set forth in said written objections, and not upon any right to a hearing before such jury of twelve. That after the order of the Court passed January 27, 1900, finally ratifying and confirming said verdict no further objection was made to said verdict except by an appeal taken by complainant and others to the Court of Appeals, which appeal was afterwards: to wit, on the 19th day of June, 1901, docketed and dismissed in the Court of Appeals. And defendants aver that they are advised that by the dismissal of

said appeal the order to the Court passed January 27, 1900, finally ratifying and confirming said verdict became final. And defendants are advised and insist that the complainant did not have the right in said case to the verdict of a jury of twelve as provided in Section 263 of the Revised Statutes relating to the District of Columbia; and they are further advised and insist that if he did have such right *be* waived the same by filing the objections in writing, a copy of which is attached to complainant's bill marked "Exhibit A. B. No. 1" and by not requesting the Court before final confirmation of the verdict to cause to be summoned such a jury of twelve.

9. Answering the allegations contained in paragraph nine of complainant's bill these defendants admit that the assessment complained of was made under the provisions of the Act of Congress therein quoted, but they aver that they are advised that the said alleged assessment is not invalid and void because of anything in said Section five nor by reason of any omission or failure to provide in said section five when the said installments shall be payable or from what date interest thereon shall be computed, and these defendants aver that the proper construction of said section five is that the said assessments should be paid in five equal *annual* installments with interest from the time of the confirmation of the said verdict, and that if by reason of any uncertainty in said section five the collection of the said assessment could not be enforced that nevertheless the assessment remained a valid lien upon the property of complainant and that the collection of the same has been provided for by section five of the Act of Congress entitled "An Act making appropriations to provide for the expenses of the government of the District of Columbia for the year ending June 30, 1903, and for other purposes" approved July 1, 1902, which provides as follows:—

"In all cases where the assessments for benefits for street extensions have been or may hereafter be levied, payment of the same shall be made in five equal annual installments with interest at the rate of four per centum per annum from and after sixty days after the confirmation of the verdict and award: Provided, That the amount of any payment of any installment or installments heretofore made on account of any such assessment shall be credited thereon, and the balance shall be due and payable as if such
13 assessment had been originally payable in the installments and with the interest as herein provided."

10. Answering the allegations of paragraph ten of complainant's bill these defendants say if the said assessment as the same appears upon the tax records of the District of Columbia casts a cloud upon the title of the complainant to the lot so assessed that he is not on that account entitled to any relief in this Honorable Court, because he could remove the same by the payment of the said assessment according to the terms of the above-mentioned Act of Congress approved July 1, 1902.

11. Answering the allegations contained in paragraph eleven of complainant's bill, these defendants say that they have made no attempt to sell the said property under the advertisement therein

mentioned, and that it is not now in their power so to do, but they aver that they do have the power and it is their duty to collect the same according to the terms of the above mentioned Act of Congress approved July 1, 1902.

12 and 13. Answering the allegations contained in paragraphs twelve and thirteen of complainant's bill these defendants say that the same are fully answered in the preceding paragraph of this answer.

14. Answering the allegations of paragraph fourteen of complainant's bill these defendants deny that the said advertisement clouds the title of complainant to his said lot, because the same has, as aforesaid, become inoperative.

15. Answering the allegations contained in paragraph 15 of complainant's bill these defendants say that all antecedent proceedings in connection with the assessments complained of were regular in all respects and according to law, and that the complainant is not entitled to any relief in this Court on account of said assessment.

16. Answering the allegations of paragraph sixteen of complainant's bill these defendants say that they are advised that the matters set forth in said paragraph are matters of law involving no question of fact which these defendants are required to answer.

17. Answering the allegations contained in paragraph seventeen of complainant's bill these defendants deny that the assessments prescribed by the law under which proceedings were taken in said cause No. 544 District Court are not uniform, and they deny that the enforcement thereof would effect the taking of complainant's property or any other property without due process of law.

18. These defendants admit that the complainant is the owner and in possession of the property therein described.

Wherefore, having fully answered the allegations of the complainant's bill in so far as they are advised that they are required to make answer thereto, they pray that they may be hence dismissed with their costs.

HENRY B. F. MACFARLAND,
HENRY L. WEST,
JOHN BIDDLE,
*Commissioners D. C.*

A. B. DUVALL,
A. H. O'CONNER, *Sol'rs.*

14 DISTRICT OF COLUMBIA, *ss:*

Personally appears Henry B. F. Macfarland, who being duly sworn says: That he is the President of the Board of Commissioners of the District of Columbia; that he has read the foregoing answer by him subscribed, and knows the contents thereof, and that the facts therein stated upon his knowledge are true and those stated upon information and belief he believes to be true.

HENRY B. F. MACFARLAND,
*President Board of Commissioners D. C.*

[SEAL.]

Subscribed and sworn to before me this 6th day of June A. D. 1903.

WILLIAM TINDALL,
*Notary Public, D. C.*

*Agreed Statement of Facts.*

Filed April 19, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 23239.

ARTHUR BRISCOE
vs.
HENRY B. F. MACFARLAND et al., Commissioners of the District of Columbia.

Arthur Briscoe, the above named complainant, for many years past has been the owner of lot 15 in Block 7 in the subdivision of land in this District known as Bloomingdale.

On the 8th day of March, 1899, the District of Columbia began proceedings in this Court, on the District Court side, for summoning a jury of seven to award damages and assess benefits by reason of a proposed extension of Rhode Island Avenue, under an Act of Congress approved February 10, 1899. A jury of seven was empaneled and on the 1st day of December, 1899, returned a verdict, assessing, *inter alia*, $1,000 against complainant's lot as for benefits supposed to have resulted thereto from the proposed extension of Rhode Island Avenue.

Of this proceeding complainant had no notice, and did not, therefore appear before the jury at any time during their proceedings, either in person or by attorney. Notice was, however, given of the proposed proceeding by the Commissioners' advertisement in the Washington Post and The Evening Star, which said advertisement described the lands to be assessed, as specified in said Act, but it did not contain the complainant's name as being an interested party, and the fact of its publication was not known to him until the verdict of the jury was returned and filed in this Court.

15 Subsequently an order of ratification *nisi* was passed in the cause, and served upon complainant. About that time, learning of the verdict through the public press, he retained counsel who appeared for him in the cause, and filed exceptions to the verdict as follows:

"The respondent, Arthur Briscoe, in response to the rule to show cause passed in the above entitled cause on, to wit, the 2nd day of January, 1900, against the confirmation of the verdict, award and assessment of the jury in the above entitled cause, for cause, shows to the Court that in so far as the said verdict and assessment concern the property of this respondent, namely, Lot 15 in Block 7 of Bloomingdale, the said verdict and assessment against the re-

spondent's said lot of $1,000, the same should not be confirmed, but should be vacated, set aside and for naught held, for the following among other reasons:

1. That the Act of Congress under which said proceedings were had is unconstitutional and void in that it fails to include in the property directed to be assessed for benefits accruing from the extension of said Rhode Island Avenue all the property within the taxing district defined in said Act.

2. That the verdict of said jury is void on the ground that it fails to assess any portion of said benefits on certain property located within the limits of said taxing District.

3. That said verdict is unjust, inequitable, oppressive and arbitrary in that it makes an unequal assessment of said benefits, if any benefits there be, which this respondent denies, upon the property included within the limits of said taxing district, as for example, the assessment on a lot belonging to the said respondent. Arthur Briscoe, being lot numbered 15 in block numbered 7 of Bloomingdale, being one thousand ($1,000) dollars, or at the rate of ten cents per square foot, while the assessment on what is known as the David Moore tract included in said taxing district is only eight hundred fifty (850) dollars for one property embracing more than three hundred thousand square feet, and one hundred fifty dollars on another lot containing about sixty thousand square feet more or less or the said assessment on the last named lots being at the rate of less than one third of one cent per square foot; and this notwithstanding the fact that said last named property is much of it closer to the said avenue than is the property of respondent, and at least to the extent of one hundred thousand square feet thereof, is benefited equally as much as is the property of this respondent, in addition to the benefits accruing to the remainder of said tract, if the said property and the property of this respondent are to be deemed as benefited at all by the extension of said Rhode Island Avenue, which this respondent wholly denies.

4. That the said assessment of one thousand (1,000) dollars made by said verdict against the said property of this respondent is greatly in excess of the benefits, if any, which respondent denies, actually accruing to said property by reason of the extension of said Rhode Island Avenue.

5. Because this respondent had no notice, either actual or constructive of the pendency of these proceedings in so far as they purport to relate to his aforesaid lot of land, and had no opportunity of being heard by the said jury in respect of the said assessment.

16

6. That the awards made by the verdict of said jury for property taken for the purpose of the extension of said Rhode Island Avenue are largely in excess of the value of said property as will readily be seen by a comparison of the amount of said award with the values at which said properties have been returned for taxation.

For which said several reasons and for others apparent upon the record, this respondent submits that the said verdict, award and as-

sessment are wholly void, and that the same should be vacated and set aside."

Objections, similar in character, to the said verdict, were filed in the cause by other owners of lands against which benefits were assessed. Arguments were had before the District Court on these objections, and the same were overruled and the verdict confirmed on the 27th day of January, A. D. 1900.

The complainant took an appeal from the order ratifying the verdict, but the appeal was not prosecuted.

In the pamphlet of sales for taxes in arrear, beginning the 8th of April, 1902, the complainant's lot was advertised for sale as follows:

"Briscoe, Arthur,

Bloomingdale, block 7, lot 15 and improvements.

| | |
|---|---|
| Assessment for extension of Rhode Island Avenue ..... | 1,000.00 |
| Interest from February 6, 1900 ..... | 86.85 |
| Assessment for curb ..... | 65.38 |
| Interest from Nov. 12, 1901 ..... | 2.12 |
| Assessment for sidewalk ..... | 67.28 |
| Interest from Dec. 20, 1901 ..... | 1.61 |
| Advertisement ..... | .50 |
| | 1,223.74 |

The assessment for curb, noted above, stated at $65.38 and the assessment for sidewalk, noted above, stated at $67.28 were paid in full by complainant on the 27th day of March, 1902.

On the 14th of April, 1902, the complainant filed his bill of complaint in this cause, and prayed for an order enjoining the proposed tax sale, pending an adjudication of the matters set up in the bill. A restraining order was issued as prayed. In due time an answer to the bill was filed by defendants, and issues joined on the answer.

It is now stipulated by counsel for the respective parties that this cause may be heard and finally determined on the bill, answer and the foregoing agreed statement of facts, reserving to counsel and parties the right to make objections to the jurisdiction of the Court in this case. And it is further agreed between the parties that the proceedings in District Cause No. 544 may be read at the hearing as a part of this stipulation.

SAM'L MADDOX,
*Attorney for Complainant.*
E. H. THOMAS,
F. H. S.,
*Attorneys for the Commissioners and the District of Columbia.*

17 *Order Substituting Parties.*

Filed June 25, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 23239.

ARTHUR BRISCOE
v.
HENRY B. F. MACFARLAND et al.

It being represented to the Court that the defendants John W. Ross and John Biddle are no longer Commissioners of the District of Columbia, having been succeeded in office by Henry L. West and Jay J. Morrow, respectively—

It is this 25th day of June, 1907, ordered, now for then, that the said Henry L. West and Jay J. Morrow be, and they are hereby, made parties defendant to this cause in lieu of the said John W. Ross and John Biddle. It is further ordered that the answer of the — Ross and Biddle stand as the answer of the said West and Morrow, at the request of the attorney for the said defendants.

HARRY M. CLABAUGH,
*Chief Justice.*

*Order Overruling Exceptions and Confirming Verdict, Award, &c.*

Filed January 27, 1900.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

*In re* THE EXTENSION OF RHODE ISLAND AVENUE. No. 544.

This cause coming on to be heard on the exceptions filed by Arthur Briscoe, Frank S. Collins and Eugene E. Gaddis, and the objections filed by Mary C. Gannett, J. W. Rose, the protests filed by Henry J. Gasson and Ronald McDonald, Charlotte R. White and A. F. Manning and the answer and objections of Amelia E. S. Stowell and Agnes K. Shoemaker, to the written verdict, award and assessment of the jury filed herein, and the motions of W. P. Lockwood and Dennis C. Shea to quash the same; and it appearing to the Court that the order *nisi* confirming said verdict, award and assessment of said jury has been duly published as therein provided, and that the owners of the property taken for the extension of said streets, and the owners of the land assessed with one-half of the amount awarded for damages have been duly notified of the pendency of this proceeding and of said assessments, as provided by the order of the

Court heretofore passed herein; it is this 27th day of January.
18 A. D. 1900 by the Court after argument of counsel for said exceptants, objectors, petitioners and other parties interested, and after due consideration of the premises, adjudged, ordered and decreed, that the aforesaid respective exceptions, objections, protests, answers and motions to quash, be and the same are hereby overruled; and that the aforesaid verdict, award and assessment be, and the same is in all respects confirmed; and the Marshal is hereby directed to transmit the aforesaid verdict, award and assessment to the Commissioners of the District of Columbia, in accordance with Law.

A. B. HAGNER, *Justice.*

*Memoranda.*

1900, February 2.—Appeal noted by Arthur Briscoe from order of January 27th, 1900.

Stipulation of Counsel as to prosecution of Appeal, filed June 11, 1900, is missing from the files of the Supreme Court of the District of Columbia.

*Decree.*

Filed July 6, 1907.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 23239.

ARTHUR BRISCOE
vs.
THE DISTRICT OF COLUMBIA et al.

This cause coming on to be heard on the bill, answer, agreed statement of facts, the proceedings in District Court Cause No. 544, referred to in said agreed statement, and all other the proceedings herein, the same was fully argued by counsel for the respective parties and submitted to the Court. Thereupon it is, upon consideration thereof, by the Court, this 3rd day of July, 1907, adjudged, ordered and decreed that the restraining order heretofore granted in this cause be, and the same is hereby discharged, and that the bill in this cause be, and the same is hereby, dismissed without costs and without prejudice to the right of the complainant, if any, to proceed at law or in this Court sitting as a District Court, in the said District Court case, as he may be advised for the cancellation of the assessment as for benefits mentioned in said bill.

By the Court:

HARRY M. CLABAUGH,
*Chief Justice.*

From the foregoing decree the complainant in open Court notes an appeal to the Court of Appeals, which appeal is allowed,
19 and the penalty of the bond on said appeal is hereby fixed at one hundred (100) dollars.

HARRY M. CLABAUGH,
*Chief Justice.*

*Opinion.*

Filed July 6, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 23308.

HELEN BUCHANAN et al.
vs.
THE DISTRICT OF COLUMBIA.

Equity. No. 23239.

ARTHUR BRISCOE
vs.
HENRY B. F. MACFARLAND et al., Commissioners of the District of Columbia.

Equity. No. 23238.

DENNIS C. SHEA
vs.
THE DISTRICT OF COLUMBIA.

This case—I say case, although there are three of them which are practically the same thing—is a case in which certain condemnation proceedings have been taken in respect to Rhode Island Avenue, the extension of Rhode Island Avenue, and certain proceedings were taken, and certain assessments found against the complainants in this case. Thereupon the District authorities undertook to sell, or advertise for sale, certain properties of the complainants to pay for their respective assessments. It was then that the complainants filed their bill for an injunction in this cause, praying that the District be enjoined from selling the property of the complainants, upon the theory that the taxes so levied, these special assessments so levied, were absolutely void, as appears from the face of the proceedings, it appearing that no notice had been given and that exceptions had been filed in the case, which, under the authority of law, ought to have enforced a rehearing in the case as set out in the case of Saunders against Macfarland. At the moment there were exceptions, that moment the office performed by these seven jurors went for naught, and then there had to be a new assessment of twelve jurors, in accordance with the act, and by reason of this assessment, as shown

by the proceeding itself, it was a menace to the title of the complainants and they asked, therefore, that the District be enjoined from selling and that the assessments be declared void, and so on.

20 This case was carefully argued by counsel on both sides, and I have given it a great deal of consideration, but I have determined that there is one question in the case which is absolutely decisive of it, and that is the question of the jurisdiction of this court, because, if the court has jurisdiction, I should be inclined to hold that the relief prayed in the bill ought to be granted, but the question is, has this Court jurisdiction of this character of cases? Now, gentlemen, I am plainly of the opinion that it has not, and I think that counsel is entitled to know why I feel compelled to decide this case upon the theory of the jurisdiction, because, after all, that, to my mind, is about the only thing in the case which is serious.

Now, in the case of Dows vs. The City of Chicago, in 11 Wallace, 108, without going into the case at all, the Court says:

"A suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal. There must exist in addition special circumstances, bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant."

That was the ground upon which *w*his case was decided.

In 15 Wallace, in the case of Hannewinkle vs. Georgetown, page 548, Mr. Justice Hunt delivered the opinion of the Court. I thought that in this case there might be a difference between a special and a general tax, because I saw reasons why equity, perhaps, ought not to take jurisdiction in cases of a general tax, but I did not see quite clearly why it would not have the right to act in a case of special tax. This case of Hannewinkle against Georgetown is a bill filed against the corporation of the city of Georgetown and its collector of taxes, to enjoin them from selling certain real estate for tax claimed by the corporation under a certain Act of Congress, which made part of the city charter. "The bill alleged that the corporation attempted to condemn to public use, and open and improve Stoddard Street in that city; that the complainant owned certain premises described on that street, that a part of the premises were condemned to public use, and his damages assessed at $3139; that the same jury which thus assessed his damages, assessed him also for benefits to the residue of his property arising from the same improvements in the sum of $3425, and attempted to make the assessment a lien and charge on the said residue, by and for which the same could be sold. This the bill alleged was without authority of law and contrary to the act of Congress under which the city professed to act. The bill prayed that the defendants might be restrained from selling the property. An answer was put in. The cause was brought to a hearing upon an agreed state of facts, and the bill dismissed with costs. From this decree of dismissal the defendant now appealed to this court."

Mr. Justice Hunt said:

"The action in this case cannot be sustained. It has been the settled law of the country for a great many years, that an in-
21 junction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits or some cause presenting a case of equity jurisdiction. This was decided as early as the days of Chancellor Kent in Mooers v. Smedley, and has been so held from that time onward. The remedy was held to be at law by writ of certiorari or by action of trespass.

"It has long been held also, that there exists no cloud upon the title which justifies the interference of a court of equity, where the proceedings are void upon their face, that is, the same record which must be introduced to establish the title claimed, will show that there is no title.

"The whole subject has been recently examined in this court in Dows v. The City of Chicago."

Now, in the case 168 United States, entirely familiar to counsel, which was the case in respect to Rock Creek Park, the court below, the Supreme Court of the District of Columbia, had dismissed or had enjoined the District from proceeding with the condemnation. The case then went to the Court of Appeals, and they sustained the lower court, and in the Court of Appeals, 8 Appeals, Judge Alvey dissented, and one of the grounds of his dissent was as follows:

"The effort to introduce an element that would give jurisdiction to the court by alleging that the threat of assessment for special benefits would produce a cloud upon the title of the property of the complainants, because if consummated, such assessment would create a lien upon the property, will not justify a court of equity in interposing, and thereby became a court of review upon the proceedings authorized by the statute. Such allegation is easily made, and it could as well be made in every case of proceeding at law, where the judgment would create a lien upon the property of the debtor, as in the present case. There must be something more than the mere fact that the property may be subject to a lien, as the final result of the pending proceeding, in order to confer jurisdiction upon a court of equity to arrest such proceeding by injunction.

* * * * * * *

"Courts of equity are not constituted for the purpose of arresting proceedings, and assuming to themselves the right of disposing of cases, that are properly depending in the ordinary courts of law. It is only upon special and particular circumstances, appealing to the conscience of the chancellor, that a court of equity is justified in interposing for the relief of the party complaining. A court of equity is not constituted a court of review on constitutional questions that may be decided by tribunals inferior to the Supreme Court of the United States; nor is such court possessed of exclusive, nor even of concurrent, jurisdiction in respect to such questions; and hence there is no authority or reasonable ground for coming

to a court of equity in a case like the present. In every case, circumstances should be stated that show that in the particular case there is an equity that cannot be availed of by the party complaining, in the proceedings sought to be restrained. There can be no reason or propriety in appealing to a court of equity to
22 restrain proceedings that are being regularly conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may arise in the course of the proceeding. To allow litigations to be thus diverted, tends to the multiplicity of litigation, and the production of unnecessary delay and expense, to say nothing of the unnecessary vexation to parties. I am of opinion, therefore, that there is no jurisdiction in equity to maintain the bill in this case."

When the case went to the Supreme Court of the United States, they reversed the Court of Appeals and then in the last paragraph of their opinion they say of Judge Alvey's opinion:

"We adopt the observation made in the dissenting opinion in the Court of Appeals: 'There can be no reason or propriety in appealing to a court of equity to restrain proceedings that are being conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may arise in the course of the proceeding. To allow litigations to be thus diverted tends to the multiplication of litigation, and the production of unnecessary delay and expense—to say nothing of the unnecessary vexation to parties.'"

So they adopt in very language the finding of Judge Alvey in the dissenting opinion upon this very question as to the jurisdiction of a court of equity in a case like this. How does it apply to the case at bar? The argument was made to the court that the proceedings were absolutely void on their face, and that they had no right to advertise this property for sale, and as long as that lien was pending, though it was an illegal lien—if I may use that expression—a lien based upon a void procedure, still it affected the title to the property and, therefore, equity ought to come in and prevent it. Now, the very same question was argued in this case of Hannewinkle against Georgetown, that very same question was passed upon, that it was not sufficient, but they go a step further, and Judge Alvey, in the dissenting opinion, seems to have clearly stated the law. Here is a proceeding that arises in the Supreme Court of the District of Columbia. What right has this court to pass in review upon the question passed upon in that court, and from which there could have been an appeal? What superior right is there in a court of equity—what reason is there why a court of equity should undertake to dispossess—if I may use that term—the District court of jurisdiction as to such a question, which questions are particularly placed within the jurisdiction of that court, and by authority of law they are to pass upon all questions incident to the opening and condemnation of streets, and so on. So that it does seem to me that the proper forum for parties complaining of unjust assessments and void assessments, and so on, is not to go into a court of equity, but to make the point in the District court and to appeal therefrom.

Now, then, in this particular case, it does not work any particular hardship, because in this case of Saunders against Macfarland, the assessment was made and a lien created, as it was supposed, some years before it went to the Court of Appeals, and the Court said that the mere fact that the term passed had no effect on the case at
23 that time; that they could take up a case no matter when or how long. That is the effect of it. These facts may have existed because the record itself shows that there had been objections in these cases filed, and the moment those objections were filed, the proceedings under them became absolutely void in behalf of the man who moved them. So that all the complainants in this case could have possibly expected from a court of equity could have been performed and done in the District court, that having taken jurisdiction of the case. In my judgment, Judge Alvey is perfectly right, that they had no right to come into a court of equity and ask the court to take out of the District court questions which that District court could settle and had the right and, under the law, was the proper channel to settle the very questions which the court of equity is now asked to interpose and take from that particular court, and, therefore, I think that for the reasons I have endeavored to assign, the bill in this case ought to be dismissed.

Mr. MADDOX: Your Honor, I think, lost sight of the principal objection I made in the bill, and that was, if we assumed that this tax was regular and proper, yet the Commissioners of the District of Columbia were exceeding their authority in undertaking to sell for the entire amount, as they had advertised.

The COURT: I remember that.

Mr. MADDOX: And the prayer of the bill was that the Commissioners be restrained from making such a sale, because under no circumstances could the entire amount be taken. The bill also invited the attention of the court of equity to the other features, but the injunction was not asked on the ground of the invalidity of the tax, but on the ground that the people who had authority to collect it were exceeding their authority, and the other things that your Honor has spoken about were incidental, but it is that to which I desire to call the attention of the court.

The COURT: The court has totally misunderstood the conception of your bill and your argument, if the ground and the basis—almost the entire basis—of the bill was not upon the theory that they were undertaking to sell the property when there was a lien which was absolutely void on its face, and they had no right to sell. The other part, I remember, was entirely incidental. They had no right, of course, to undertake to collect something that is not due. That, unquestionably, is true.

Mr. MADDOX: That was the main point of the bill, that they could not collect in five installments, when they were not due.

The COURT: They not only could not, but they repudiated any idea that they could. I was passing on the larger questions which were argued, and the other part I understood to be a mere incident to the bill, so much so that my entire time was given up to the question as to whether you had stated in your bill any right for the

injunction which you are asking on the ground that the proceedings were absolutely void. There was some argument as to the amount that was due. Of course, they were not entitled to collect what was not due, at any rate, and I so understood counsel to assert at the hearing of this case.

24 Mr. MADDOX: If you- Honor, please, the advertisement was for the entire amount of the tax, and they were undertaking to collect that by a sale, and the sale was then pending. Now, at the most, the owners of the property could not have owed more than two installments or two-fifths of the whole amount, and it was for the purpose of restraining that sale for the entire amount that this bill was filed.

Mr. THOMAS: The statement of fact does not show anything of that kind. We agreed on a statement of facts and it shows nothing of that kind.

The COURT: I have not given very much attention to that phase of the bill, Mr. Maddox, because it was not the question argued before me. It was not the question insisted upon. It was stated in argument as a reason, but not the real reason for the equity jurisdiction, and when I came to examine your statement of facts in the case and the answers here, there was not even the slightest suggestion to bring that to my attention. If that were the motive of your bill, if that were the purpose of your bill, to restrain them because they were asking for a certain amount of money which would not be due at that time, that question would be long passed away now, because it is all due now, and I understand, of course, that that would relate back to the time of the filing of your bill. But that question was not put in your agreed statement of facts, and was not by me regarded as the serious ground upon which you filed your bill.

Mr. MADDOX: The reason it was not put in that agreed statement of facts was because it is a matter of law arising on the averments of the bill and the agreed statement of facts says that the cause was to be heard on the bill and the answer and the agreed statement of facts.

The COURT: I do not think that has the slightest thing to do with the bill, for manifest reasons, but it may be a matter which I ought to consider in the taxation of costs, which I perhaps will do, but I do not think it has any real function to perform so far as the jurisdiction of this court is concerned.

HARRY M. CLABAUGH,
*Chief Justice.*

*Memoranda.*

July 15, 1907.—Appeal Bond filed.

Time to file transcript of record extended from time to time until May 4, 1908.

25 *Directions to Clerk for Preparation of Transcript of Record.*

Filed March 26, 1908.

In the Supreme Court of the District of Columbia.

In Equity. No. 23239.

ARTHUR BRISCOE
vs.
THE DISTRICT OF COLUMBIA and Others.

To the Clerk:

In making up the record for appeal in the above-entitled cause, please include the following and no other memorandums of the proceedings:

1. The original bill, and restraining order issued thereon.
2. The demurrer of the District of Columbia.
3. The answer of defendants and memorandum joinder of issue.
4. Order substituting parties.
5. Agreed statement of facts.
6. At the request of Corporation Counsel the following from the proceedings in District Court No. 544 in the matter of the extension of Rhode Island Avenue:

(*a*) Order overruling exceptions, and confirming verdict of jury of seven, passed January 27, 1900.

(*b*) Memorandum. Appeal by Arthur Briscoe from last order.

(*c*) Stipulation of counsel as to prosecution of appeal, filed June 11, 1900.

7. Decree passed July 3, 1907, and appeal by complainants.
8. Memorandum. Appeal bond approved and filed July 15, 1907.
9. Opinion of Mr. Chief Justice Clabaugh.
10. Memoranda. Extensions of time for filing transcript of record to May 4, 1908.

Respectfully yours,

MADDOX & GATLEY,
*Att'ys for Appellant.*

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 40, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 23239, In Equity, wherein Arthur Briscoe is Complainant, and Henry B. F. Macfarland et als. are Defendants, as the same remains upon the files and of record in said Court.

26 In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 30th day of March, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

In the Court of Appeals of the District of Columbia.

No. 1886, April Term, 1908.

ARTHUR BRISCOE, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

It is hereby agreed between counsel for appellant and appellees herein that the missing stipulation entered into between counsel for said Briscoe and the Corporation Counsel, filed June 11, 1900, in District Court case No. 544, under which proceedings were conducted for the extension of Rhode Island Avenue, recited that said Briscoe, and Frank S. Collins and Eugene E. Gaddis had taken an appeal from the order passed in said Cause No. 544, on the 27th day of January, 1900, confirming the verdict of the jury of seven, to the Court of Appeals of the District of Columbia and that said appeal should abide by the decision of the Supreme Court of the United States in the case of Wight v. Davidson, then pending, and since decided and reported in 181 U. S., 371.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
*Attorneys for Appellant.*
EDWARD H. THOMAS,
*Attorney for Appellee.*

(Endorsed:) Court of Appeals D. C. No. 1886. April Term 1908. Arthur Briscoe vs. Dist. of Columbia. Addition to Record per Stipulation of Counsel. Court of Appeals, District of Columbia. Filed May 11, 1908. Henry W. Hodges, Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 1886. Arthur Briscoe, appellant, vs. Henry B. F. Macfarland et al. Court of Appeals, District of Columbia. Filed Mar. 30, 1908. Henry W. Hodges, clerk.

27 WEDNESDAY, *October* 14*th*, *A. D.* 1908.

No. 1885.

DENNIS C. SHEA, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and JAY J. MORROW, Commissioners of the District of Columbia, and the District of Columbia.

and

No. 1886.

ARTHUR BRISCOE, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and JAY J. MORROW, Commissioners of the District of Columbia, and the District of Columbia.

The argument in the above entitled causes was commenced by Mr. Samuel Maddox, attorney for the appellants, and was continued by Mr. E. H. Thomas, attorney for the appellees, and was concluded by Mr. Samuel Maddox, attorney for the appellants.

28 THURSDAY, *October* 15*th*, *A. D.* 1908.

No. 1885.

DENNIS C. SHEA, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and JAY J. MORROW, Commissioners of the District of Columbia, and the District of Columbia.

and

29 No. 1886.

ARTHUR BRISCOE, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and JAY J. MORROW, Commissioners of the District of Columbia, and the District of Columbia.

On motion, leave is granted the appellants to file additional brief herein if so advised.

No. 1886.

ARTHUR BRISCOE, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and JAY J. MORROW, Commissioners of the District of Columbia, and the District of Columbia.

*Opinion.*

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

This is an appeal from a decree dismissing the bill of appellant to enjoin the sale of a lot of land in the city of Washington under a special assessment for benefits in improving a street, and to vacate said assessment.

The cause was submitted upon bill, answer, and an agreed statement of facts.

The necessary facts are as follows: Plaintiff was, on and before March 8, 1899, the owner of lot 15, in block 7, of the subdivision known as Bloomingdale. On that day the Commissioners of the District began a proceeding in the District Court for the condemnation of the land necessary to the extension of Rhode Island avenue, under authority of an act of Congress approved March 3, 1899. The act provided that one-half of the amount awarded as damages for the land condemned shall be assessed against certain lands to be benefited thereby, lying on each side of said avenue, between certain named streets,and other designated squares and lots, including plaintiff's lot. These assessments when confirmed by the court were declared a lien on the lands severally assessed, to be paid in five equal instalments, and collected as special improvements are collected, under other laws; that is to say, by sale by the collector of taxes. A jury of seven was empaneled to assess the damages and benefits. The verdict returned assessed $1,000 against plaintiff's lot. Plaintiff was not personally cited to appear. The notice given was by publication to all property owners, as provided by law. A rule was issued to all parties whose lands had been assessed to show cause why the verdict should not be confirmed. Plaintiff appeared and filed objections to the award as unconstitutional, unjust, etc. The court overruled the objections and confirmed the verdict. Plaintiff appealed therefrom to the Court of Appeals, but subsequently dismissed the same. The collector advertised the lot for sale for the entire amount of the assessment, interest, and costs of advertising. In the meantime Congress corrected the ambiguity in the law as to collection in five equal instalments requiring the same to be collected in five equal annual instalments. An order restraining the sale was issued on the filing of the bill, April 14, 1902. The defendant answered the bill, and no further proceedings were had until July 6, 1907, when, after hearing upon bill, answer and agreed statement of facts, the restraining order was discharged, and the bill dismissed.

1. The objection to the constitutionality of the act of Congress under which the condemnation of lands and the assessment of bene-

fits were effected in this case is untenable. Congress had the power to order the extension of the avenue, the condemnation of the lands necessary therefor, the designation of the taxing district for the assessment of benefits, and the giving of notice to the owners of land therein by publication. Wight v. Davidson, 181 U. S., 371, 378, 381, 382; Bauman v. Ross, 167 U. S., 548; Buchanan v. Macfarland, 31 App. D. C., 6, 18. There is nothing in the record to indicate that the amount assessed against plaintiff's lot was actually in excess of the benefits accruing from the extension of the avenue, so as to bring the same within the principle governing the later case of Martin v. D. C., 205 U. S., 135, 140.

2. The serious question in this case has its origin in the order of the District Court, in the condemnation proceeding, confirming the verdict returned therein, notwithstanding objections thereto had been filed by the plaintiff and others whose lands were affected.

As that proceeding was expressly governed by the procedure prescribed in several sections of the Revised Statutes of the District, the court should have vacated the verdict and ordered a jury of twelve to be summoned to make a new assessment. That was its duty under section 263, Brown v. Macfarland, 19 App. D. C., 525, 581.

The contention, founded on the failure to perform this duty, is that the court had no power to do aught else than to vacate the verdict, discharge the jury, and summon a new jury, and that, therefore, its order of confirmation is void. In support of this contention, two cases are cited wherein expressions are used indicating that such is the result. Brown v. Macfarland, 19 App. D. C., 525, 531; Macfarland v. Saunders, 25 App. D. C., 438, 442. In discussion of a like contention in the recent case of Buchanan v. Macfarland (31 App. D. C., 6, 19), it was said: "The expressions to the effect that the order of confirmation in opposition to the objections was null and void, must be considered with reference to the questions actually presented for decision. In the first of those cases the objectors appealed from the order confirming the verdict notwithstanding their objections. In the second case the order confirming the verdict had been set aside, on petition of the objectors, in so far as it applied to the assessment of benefits, but confirmed as regards the assessment of damages for land taken or damaged. The Commissioners of the District appealed from this order, which was affirmed. The case at bar stands on entirely different grounds. It is neither an appeal from an order overruling exceptions and confirming the verdict, nor a direct proceeding to set aside the order of confirmation and open the case for determination by another jury. We think the order of confirmation was not absolutely void as against their attack. The appellants were not among the objectors, and it may be presumed that the objectors withdrew or waived their objections and accepted the result as they had a right to do. See Macfarland v. Byrnes, 19 App. D. C., 531, 538, decided on the same day with Brown v. Macfarland, supra."

It is to be remembered, however, that in the case at bar the party had offered objections to the verdict, which were not withdrawn or waived, and there can be no presumption, therefore, in favor of the regularity of the order of confirmation as in the case quoted from.

This difference between the two cases presents a good reason for the reconsideration of the question. It is conceded that section 263, made it the duty of the court, when the objections were offered to the verdict, to empanel a new jury of twelve for the purpose of reassessing the damages and benefits. It defines the duty of the court, but does not, in terms at least, declare that the court shall have no other or further jurisdiction in the premises; nor does it declare that such an order of confirmation shall be void, though as we have seen in the cases referred to above, such an order of confirmation has been referred to as void. In its strict legal sense, "void" means without force or effect, something that does not bind or conclude anybody, or serve to convey or divest a right. "Voidable" means that which has some force or effect, but which may be set aside or annulled for some error or inherent vice or defect. The word void is frequently used in statutes, contracts, and other instruments without regard to its strict legal signification. Ewell v. Daggs, 108 U. S., 143, 148. That case depended upon the construction of a statute. Mr. Justice Matthews, speaking for the court, said: "It is quite true that the usury statute referred to declares the contract of loan, so far as the whole intent is concerned, to be 'void and of no effect.' But these words are often used in statutes and legal documents, such as deeds, leases, bonds, mortgages, and others, in the sense of voidable merely—that is, capable of being avoided—and not as meaning that the act or transaction is absolutely a nullity, as if it had never existed, incapable of giving rise to any rights or obligations under any circumstances.

Thus we speak of conveyances void as to creditors, meaning
31 that creditors may avoid them, but not others. Leases which contain a forfeiture of lessees' estate for non-payment of rent, or breach of other conditions, declare that on the happening of the contingency the demise shall thereupon become null and void, meaning that the forfeiture may be enforced by reentry at the option of the lessor. It is sometimes said that a deed obtained by fraud is void, meaning that the party defrauded may at his election treat it as void." See, also, Tolbert v. Horton, 31 Minn., 518, 520.

It may be added that the word is not infrequently used in judicial opinions without special regard to its strict sense and the distinction between it and "voidable," where the subject-matter did not necessarily demand exactness of definition or limitation. Somes v. **Brewer, 2 Pick., 184, 191.** It is a familiar principle that the judgment of a court having no jurisdiction of the subject-matter is void in the strict sense of the word. It binds or concludes no one. No rights can be acquired under, or divested by it. It is in fact no judgment at all. But when a court has such jurisdiction and proceeds to render a judgment contrary to law or to its duty in the premises, that judgment is erroneous only—that is to say, voidable, but not void. As said by Mr. Justice Miller in Ex parte Lange (19 Wall., 163, 175): "A judgment may be erroneous and not void, and it may be erroneous because it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes." In a recent case it was said by Mr. Justice Holmes: "No doubt it

sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty of the court. Under the common law it is the duty of the court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power—that is, the jurisdiction of the court—dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule or substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. Where it affects a court of general jurisdiction and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words, as meaning to leave the judgment open to dispute, or as intended to do more than fix the rule by which the court should decide." Fauntleroy v. Lum, 210 U. S., 230, 234.

The act of March 3, 1899 (30 Stat., 834), adopted only a part of chapter 11, R. S. D. C., which provided for the condemnation of lands for new public roads in the District. No provision was therein made for the assessment of benefits. The District authorities were vested with full power in such cases to determine upon the establishment and location of such new roads. In case of the failure of landowners to give the necessary land or to agree upon the damages, the Commissioners were authorized to direct the marshal to summon a jury of seven to assess the same. In case of objection to the verdict returned, a new jury of twelve was to be summoned, whose verdict was directed to be recorded as final and conclusive. The intervention or supervision of no court was provided for. The growth of the city of Washington since that time has rendered it important to extend the streets of the city throughout the adjacent country in order to meet the new conditions and preserve conformity with the general plan; and Congress has met the demand, from time to time, by providing for the necessary extension of streets and avenues, and the assessment of benefits in part payment for damages incurred. The act of March 3, 1899 (30 Stat., 834), ordered the extension of Rhode Island avenue, and provided that one-half of the damages incurred in the necessary condemnation of the land therefor, should be assessed against other property within certain limits as benefits. Instead of calling a jury themselves, under the old statute relating to roads, the Commissioners were required to "commence suit" for the condemnation of the land. No court was designated, as in some other acts; but, as the Supreme Court of the District was the only court in which a suit could be commenced, it was necessarily meant, and the proceedings were begun therein. The jury of seven was ordered by that court and proceeded to perform their duties under its supervision. It is true that under the procedure adopted from the Revised Statutes, the court should have ordered a new jury, when objection was made to the verdict of the first. And, although section 264 of the old statute declared that the second verdict should be final and conclusive, the effect was qualified by section 5 of the

act of 1899, which requires confirmation by the court before it could take effect. The power to confirm necessarily included the power to set aside and order the assessment to be made again. Nor would the order of confirmation of a second verdict be final and conclusive, because under the general law creating the Court of Appeals an appeal lies thereto from any final order of the Supreme Court of the District, or any justice thereof, unless such right of appeal be negatived by the terms of the particular act. No such effect can be attributed to the act under consideration. Having to construe all of the statutes referred to, we are of the opinion that the jurisdiction of the Supreme Court of the District over the subject-matter of the suit did not cease with the return of the verdict and the presentation of the objections thereto. While it acted contrary to law in not ordering the reassessment by a new jury, its order of confirmation is not void, but erroneous and voidable merely. Appellant was in court and gave notice of appeal from the order, and took his appeal. Had he prosecuted the same the result would have been the reversal of the order for the error committed. Instead of prosecuting, he voluntarily dismissed his appeal. The order of confirmation must, therefore, be regarded as in force and having the effect to terminate the suit or proceeding, and to conclude the right of the appellant in this new proceeding in equity.

3. The foregoing conclusion renders it unnecessary to consider whether it would be proper for a court of equity to entertain jurisdiction of a bill to remove a cloud from a title, created by the advertisement of property for sale under a lien founded on a void judgment.

The decree dismissing the bill will be affirmed with costs.

Affirmed.

32 MONDAY, *November 16th, A. D.* 1908.

No. 1886, October Term, 1908.

ARTHUR BRISCOE, Appellant,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST and JAY J. MORROW, Commissioners of the District of Columbia, and The District of Columbia.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause, be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.

November 16, 1908.

33 TUESDAY, *December 1st, A. D.* 1908.

No. 1886.

ARTHUR BRISCOE, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST and JAY J. MORROW, Commissioners of the District of Columbia, and The District of Columbia.

An appeal to the Supreme Court of the United States in the above entitled cause was prayed by Mr. H. P. Gatley, of counsel for the appellant, and on motion, the mandate in said cause is stayed until further order.

TUESDAY, *December 22nd, A. D.* 1908.

No. 1886.

ARTHUR BRISCOE, Appellant,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST and JAY J. MORROW, Commissioners of the District of Columbia, and The District of Columbia.

On consideration of the motion for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, It is by the Court this day ordered that said appeal be, and the same is hereby, allowed, and the bond for costs is fixed at the sum of three hundred dollars.

34 (*Bond on Appeal.*)

Know all Men by these Presents, That we, Arthur Briscoe, as principal, and Dennis C. Shea, as surety, are held and firmly bound unto Henry B. F. Macfarland, Henry L. West and Jay J. Morrow, Commissioners of the District of Columbia and the District of Columbia, in the full and just sum of Three hundred dollars, to be paid to the said Henry B. F. Macfarland, Henry L. West and Jay J. Morrow, Commissioners of the District of Columbia and the District of Columbia, certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this thirtieth day of December, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Arthur Briscoe and Henry B. F. Macfarland, Henry L. West and Jay J. Morrow, Commissioners of the District of Columbia, and the District of Columbia,

a decree was rendered against the said Arthur Briscoe and the said Arthur Briscoe having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Henry B. F. Macfarland, Henry L. West and Jay J. Morrow, Commissioners of the District of Columbia, and the District of Columbia, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Arthur Briscoe shall prosecute said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ARTHUR BRISCOE. [SEAL.]
D. C. SHEA. [SEAL.]

Sealed and delivered in presence of—
SAM. MADOX.

Approved by—
SETH SHEPARD,
*Chief Justice Court of Appeals of the District of Columbia.*

[Endorsed:] No. 1886. Arthur Briscoe, Appellant, vs. Henry B. F. Macfarland et al. Bond for costs on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jan. 4, 1909. Henry W. Hodges, Clerk.

35 UNITED STATES OF AMERICA, *ss:*

To Henry B. F. Macfarland, Henry L. West and Jay J. Morrow, Commissioners of the District of Columbia, and The District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Arthur Briscoe is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 4th day of January, in the year of our Lord one thousand nine hundred and nine.

SETH SHEPARD,
*Chief Justice of the Court of Appeals of the District of Columbia.*

Service accepted this 4th day of January, A. D. 1909.
E. H. THOMAS.
F. H. S.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jan. 4, 1909. Henry W. Hodges, Clerk.

36 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 35, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Arthur Briscoe, Appellant, vs. Henry B. F. Macfarland, Henry L. West and Jay J. Morrow, Commissioners of the District of Columbia, and the District of Columbia, No. 1886, January Term, 1909, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 4th day of January, A. D. 1909.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
*Clerk of the Court of Appeals of the District of Columbia.*

Endorsed on cover: File No. 21,500. District of Columbia Court of Appeals. Term No. 141. Arthur Briscoe, appellant, vs. Henry B. F. Macfarland, Henry L. West, and Jay J. Morrow, Commissioners of the District of Columbia, and The District of Columbia. Filed January 29th, 1909. File No. 21,500.

FILED
APR 29 1911
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

October Term, 1910.

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No. 141.

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ARTHUR BRISCOE, Appellant,

vs.

HENRY B. F. MACFARLAND ET AL., Commissioners of the District of Columbia.

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SUPPLEMENTAL BRIEF IN BEHALF OF THE APPELLANT.

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SAMUEL MADDOX,
H. PRESCOTT GATLEY,
*Attorneys for Appellant.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

## No. 141.

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ARTHUR BRISCOE, APPELLANT,

*vs.*

HENRY B. F. MACFARLAND ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

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## SUPPLEMENTAL BRIEF IN BEHALF OF THE APPELLANT.

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As stated during the oral argument, the original bill in this cause was hastily drawn to meet an emergency—the threatened sale of appellant's property by the city tax collector. As an incident to the primary purpose of the bill the additional charge was made that the tax was invalid. This was done with the object of having the entire controversy between the appellant and the District of Columbia settled in one suit. In the long line of cases decided by the Court of Appeals, involving the identical question, without a discordant note,

it had been held that assessments levied as in this case were invalid and void. Wherefore the bill was not framed with any thought that the constitutional question would ever be reached in the final disposition of the cause.

But it is submitted that the point is sufficiently made in the pleadings and the agreed statement of facts. In the latter, which gives the exception filed by the appellant to the verdict of the jury of seven, is the following:

> "4. That the said assessment of one thousand (1,000) dollars made by said verdict against the said property of this respondent is greatly in excess of the benefits, if any, which respondent denies, actually accruing to said property by reason of the extension of said Rhode Island avenue" (R., p. 16).

That this claim was made is nowhere controverted in the answer of the District Commissioners; on the contrary, it agreed that it was made as stated. And it could not have been controverted, for the map attached to appellant's brief is the *res ipsa loquitur* louder than any testimony that might or could be given by experts, in more unambiguous tones than the verdict of any jury could voice.

In establishing the taxing district Congress decreed that the lots just east and south of the lot belonging to appellant, having the same superficial area, would not be benefited at all by reason of the projected improvement. According to the ratio

thus established by the law makers, an assessment of $1,000 against appellant's lot could not be other than "greatly in excess" of the benefits conferred upon him.

Again, take lots 19, 20, 21, 22, and 23, in block 17, fronting west on Le Droit avenue at the corner of Seaton street. These lots occupy identically the same relation to Rhode Island avenue as does appellant's lot except that they are nearer to the avenue by twenty feet—that is, one-half of the difference between the width of Seaton street, on which the lots in block 17 abut, and T street, on which appellant's lot abuts. The act of February 10, 1899, provided for the extension of Rhode Island avenue from Florida avenue to Le Droit avenue. Until that time, therefore, the lots on the corner of Seaton street and Le Droit avenue had no street outlet towards the west. The opening of this portion of the avenue must have been of great convenience to these lots. And yet Congress decreed that they were without the pale of assessment because, and only because, of course, no appreciable benefit would be conferred by the opening of the avenue at their very doors.

On the other hand, when the act of February 10, 1899, was passed Rhode Island avenue from Le Droit avenue eastward to North Capitol street, a distance of about 1,500 feet, had been dedicated by the owners of the land without expense to the public. Appellant enjoyed the convenience afforded by this wide avenue for a distance of 650 feet west-

ward and 850 feet eastward. For this benefit he must have paid when he originally purchased his lot. Why should he pay a benefit for the extension or continuance of the avenue 650 feet distant from him at the nearest point? And if by congressional decree the lots in block 17 are not benefited by the public improvement, by the same token appellant's lot could not be and any assessment would necessarily be "greatly in excess" of benefit. The amount assessed against it, $1,000, is, therefore, practical confiscation.

So, for the purpose of maintaining the constitutional point, it should be admitted, as shown beyond peradventure, that the assessment is "greatly in excess" of the benefits, thus bringing the appellant within the rule laid down by this court in *Norwood against Baker*.

Paragraph 17 of the bill (R., p. 4) charges, on the advice of counsel, that the act of February 10, 1899, as so applied in the matter of this assessment, is repugnant to the Constitution. In paragraph 17 of their answer the Commissioners, under oath, deny that the assessments "are not uniform," and that the enforcement of the assessment against the appellant would not be a taking of his property without due process of law.

This denial is two-fold:

First. A denial of the statement of fact in the bill that the assessments are not uniform. A glance at the map conclusively demonstrates that the Commissioners were incautious in making such a

sweeping statement, for nothing more un-uniform than the designation of the lands for assessment could possibly be conceived.

Second. A denial of the conclusion of law. It is not within the province of the District Commissioners thus to dispose of legal questions presented. That is the province of the court. An issue of law is, however, tendered for the court to decide. The fact is practically admitted, or overwhelmingly demonstrated, that the assessment is *greatly in excess of benefits.*

The failure of the court to so hold constituted the third assignment of error.

Appellant ought not to be deprived of his constitutional guaranties in this case if it can be avoided. In formulating the pleadings his counsel relied, as they had the right to rely, on the rulings of the Court of Appeals, according to which appellant would have obtained full relief, but these rulings were ignored when the court some years later, and in this case, reversed all its previous rulings on the points in controversy.

In this connection the attention of the court is again invited to what the Court of Appeals said about the merits of appellant's contention that he should be relieved against this most inequitable assessment.

> "Appellant was in court and gave notice of appeal from the order, and took his appeal. Had he prosecuted the same the re-

sult would have been a reversal of the order for the error committed" (R., p. 33).

It is, after all, around this order that the controversy in the case turns. The Court of Appeals has decided the point in two different ways, one directly the opposite of the other. In this case it held, and for the first time in the history of the court, that an order confirming the verdict of a jury of seven, proceeding under sections 257 to 267 of the Revised Statutes of the United States relating to the District of Columbia, over objections of the land-owners, is *voidable* only and as such *error*. If this be the proper construction of section 263, then, in order to correct the error, the appellant must have prosecuted an appeal. He took but did not prosecute an appeal, and the erroneous judgment cannot now be attacked by him either in the original cause or in any collateral proceeding.

But if, on the other hand, the order of the District court, confirming the verdict of the jury of seven, was *void as in excess of jurisdiction*, as previously had been held by the Court of Appeals in several cases, and always by a unanimous court, then it was not incumbent on the appellant after filing objections to take any further step in the cause.

No appeal or any other act of his could have given vitality to this void judgment. His consent even would not have given the court jurisdiction to pass the order of confirmation, for other land-owners objected to the verdict (R., p. 2, par. 8),

and section 263 declares that if "any land-owners are dissatisfied" there *shall* be a jury of twelve.

The question thus narrows down to this: When appellant filed exceptions to the verdict of the jury of seven and no "arrangement being made between" him and the District Commissioners, it was his right under section 263 to have a jury of twelve. In denying him this right the court deprived him of that due process of law specified in the act of Congress conferring jurisdiction on the Supreme Court of the District of Columbia.

This point is covered by the second of the errors noted in the assignment of errors (Appellant's Brief, p. 5).

This is by far the most important and far-reaching question in the case, and one that will determine the result of many pending cases in the District courts. In no one of such cases is the amount involved sufficient to give this court jurisdiction, though the aggregate is large. It is of the utmost importance, therefore, that the question should finally be settled, so that the tax-payers of the District may know their rights under the law and an end be put to vexatious and costly litigation. It is hoped, therefore, that this court will finally decide as between the conflicting decisions of the Court of Appeals which is right.

Referring further to the point that the appeal in this case should be dismissed because there is no assignment of errors as required by section 997 of the Revised Statutes—since the oral argument in

this case we have been informed by the clerk of the Court of Appeals that in not one case in ten coming up from that court to this has there been an assignment of errors in the record. It once happened during the twelve years that litigation has been going on in the District courts over these so-called benefit assessments that the corporation counsel found it advisable to take an appeal from the judgment of the Court of Appeals. The case is reported as Macfarland *vs.* Brown, 187 U. S., 239. There was no assignment of errors in the record in that case, and the fact was not noticed either in the briefs of opposing counsel or by the court in its opinion.

Respectfully submitted.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
*Attorneys for Appellant.*

Office Supreme Court, U. S.
FILED.
APR 13 1911
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

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No. 141.

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ARTHUR BRISCOE, APPELLANT,

*vs.*

HENRY B. F. MACFARLAND ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

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# REPLY OF THE APPELLANT TO BRIEF IN SUPPORT OF THE MOTION TO DISMISS OR AFFIRM ON THE MERITS.

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SAMUEL MADDOX,
H. PRESCOTT GATLEY,
*Attorneys for Appellant.*

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

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ARTHUR BRISCOE, APPELLANT,

*vs.*

HENRY B. F. MACFARLAND ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

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## REPLY OF THE APPELLANT TO BRIEF IN SUPPORT OF THE MOTION TO DISMISS OR AFFIRM ON THE MERITS.

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The appellant, Arthur Briscoe, is the owner of lot numbered 15—the "northwest corner lot"—block numbered 7 in a subdivision of a tract of land in the District of Columbia, known as Bloomingdale, situated on Fourth street east, near the south line of Rhode Island avenue, as extended.

On the 10th of February, 1899, Congress passed an act for the extension of Rhode Island avenue, authorizing the Commissioners of the District of Columbia to "commence suit" for the condemnation of the land required for the proposed

extension. The act directed that the condemnation proceedings should be conducted "under and according to the provisions of sections 257 to 267 of the Revised Statutes of the United States relating to the District of Columbia," which provided for opening and laying out of public roads in the District.

Section 257 of the enumerated sections directed that the marshal should first summon a "jury of seven," which jury should view the premises and return a verdict in writing. Section 263 provided that if the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, "the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men," to proceed as had been before directed by the act in regard to the first jury.

In the matter of assessments, the act provided in section 3 that one-half of the amount found due and awarded as damages should be assessed against lands within a designated area. The distance of the lands, so designated for assessment, was not uniform; at some points it was limited to two hundred feet from the line of the extension and at others it extended six hundred feet and more. A map of the locality giving the outlines of the taxing area is appended to this brief. Appellant's lot is indicated by the letters "A B."

Section 5 of the act provided that the assessment should "be payable in five equal installments, with interest at the rate of four per cent. per annum," but did not specify when the first installment should be paid or what interval of time should intervene between the "equal installments."

On the 8th day of March, 1899, the Commissioners filed a petition in the Supreme Court of the District, the same being District Court case No. 544, asking that a jury of seven be summoned to award damages and make assessments as required by the act of February 10, 1899. The jury returned their verdict into court on the 1st day of December, 1899, and therein levied an assessment of $1,000 against appellant's land.

The appellant had received no actual notice of these proceedings and did not know of them until the verdict had been filed. But on the 2d day of January, 1900, appellant was served with a rule to show cause why the verdict, following proceedings of which he had no notice, should not be confirmed.

As required by this rule, appellant appeared and filed an answer objecting to the verdict of the jury of seven and assigning many reasons for the objections, among others, because the assessment was greatly in excess of any benefit accruing to his property because of the public improvement.

Appellant's exceptions were overruled, and the "verdict, award, and assessment" of the jury finally ratified and confirmed by an order of the District Court passed on the 27th day of January, 1900. From this order an appeal was taken but not prosecuted, the claim of the appellant, as made by his bill, being that after exceptions filed to the verdict of the jury of seven, the court was without jurisdiction to do aught else than direct the marshal to summon a jury of twelve, as provided by section 263.

In spite of this protest by the appellant, the District Commissioners advertised his lot for sale at the annual public tax sale, beginning April 8, 1902, for the entire assessment of $1,000 and interest thereon, amounting to $86.85. Assessments for curb and sidewalk were included in the sale notice, but these had been paid on the 27th day of March preceding (R., p. 16).

Appellant thereupon brought his bill, praying that the commissioners might be perpetually enjoined and restrained from selling his lots and that the assessment might be declared invalid and void, and that the Commissioners be directed to "cancel the said alleged assessment on the tax records of defendant corporation" (R., p. 5). A restraining order was issued as prayed and the appellant's property withdrawn from sale.

A general demurrer was filed by the Commissioners on the 7th day of May, 1902, but never set down for hearing.

The Commissioners answered the bill on the 15th day of June, 1903, and issues were joined on the answer. In this answer the Commissioners set up that on the 1st day of July, 1902, an act of Congress had been passed, which provided that assessments for benefits in street extension cases should be paid in five equal annual installments, the first installment sixty days after the confirmation of the verdict and award. The answer further averred that it was the duty of the Commissioners to sell appellant's property under the last-mentioned act. After waiting for a year or more beyond the time when the entire assessment was due under the act of July 1, 1902, and it then appearing that the assessment was still being carried on the municipal tax books as a charge against appellant's property, an agreed statement of facts was entered into and filed in the case (the signed agreement also applying to two other cases then pending) (R., p. 19).

The case was set down for final hearing on the bill, answer, and agreed statement of facts on the 6th day of July, 1907, and that day dismissed without prejudice to appellant's right to proceed as he might be advised in the District Court for a cancellation of the assessment mentioned in the bill (R., p. 19).

From this decree appellant took an appeal to the Court of Appeals.

The Court of Appeals affirmed the decree of the court below, not on the ground of want of jurisdiction in the equity court to entertain it, but for the reasons:

(1) That the proceedings in the condemnation case were regular and showed no excess of jurisdiction, and—

(2) That the act of February 10, 1899, did not violate any right guaranteed to the appellant by the Constitution.

From this judgment of the Court of Appeals the present appeal is prosecuted.

## Assignment of Errors.

The Court of Appeals erred:

1. In not holding that the District Court was without jurisdiction to confirm the verdict of the jury of seven over the objections of appellant.

2. In not holding that the verdict of the jury of seven became void and of no effect on the filing of objections thereto by the property owners.

3. In not holding that the act of February 10, 1899, was unconstitutional.

## I.

## The Showing of the Bill on which the Restraining Order was Passed.

The bill was filed April 14, 1902. At that time the annual tax sales were in progress, having been commenced, according to public announcement, on the 8th day of that month. As a rule, these sales continue from six to ten days, and the several properties are offered for sale in the order of the number of the square in which they are situated. Plaintiff's lot, being in the "county" and having no square number, had not been reached in its order when the bill was filed. But the sale was impending. The primary purpose of the bill was to stop the sale, and the interposition of equity was invoked on two grounds:

1. *That the tax sought to be enforced by sale was not due.*

2. *That the tax had been improperly levied and was void, and that, therefore, its collection could not be legally enforced by the District Commissioners by sale or otherwise.*

Just what this means is not quite clear.

No act of Congress touching this matter was approved on the 20th day of February, 1871, and there is nothing in any other act making that particular day an era in its relation to special taxes. But however this be, the act of February 28, 1908, was the tax sale law in force in April, 1902, when appellant's lands were advertised for sale. This act required the assessor to "prepare a list of all taxes on real property in the District subject to taxation on which said taxes were in arrears on the first day of July of each year hereafter"—*all* necessarily including special as well as general taxes. It will be noticed that lands can be sold only where the taxes are in arrears on the first day of July previous. As has been pointed out, the appellant was not in arrears in respect of this benefit assessment on the first of July, 1901, and his name should not, therefore, have appeared on the delinquent list which was published in the tax sale pamphlet for the sale which began in April, 1902.

This attempted benefit assessment was not "in arrears on the first of July" preceding the advertiesment, and there was nothing else that could "avail to confer the powers sought to be exercised" by the District Commissioners (168 U. S., 612).

**b.**

***The assessment is illegal and invalid and the threatened sale of appellant's property was a grievance which entitled him to go into equity for relief.***

The act of February 10, 1899, authorized and directed the District Commissioners to "commence suit for the condemnation of the land required for the extension of Rhode Island avenue from Florida avenue to Le Droit avenue within thirty days from the passage of this act, and the proceedings

for such condemnation shall be under and according to the provisions of sections two hundred and fifty-seven to two hundred and sixty-seven of the Revised Statutes of the United States relating to the District of Columbia."

These sections provide that when application is made to the "proper authorities" to lay out a new or extend any existing road, and "any owner of land shall object and claim damages," the marshal shall summon a jury of seven disinterested men to assess the damages, if any may be sustained (sec. 257). This jury is required to appear on the premises, assess damages, and return a written verdict "which shall be recorded" (sec. 262).

The act of February 10, 1899, authorizes and directs the Commissioners to "commence suit," without specifying the court. In accordance with this mandate, the Commissioners began suit in the Supreme Court of the District of Columbia, sitting as a District Court. A jury of seven was summoned by the marshal, and returned into court a written verdict on the first day of December, 1899. A rule to show cause was thereupon issued requiring appellant and all other persons affected by the verdict to show cause, if any they had, why the verdict should not be confirmed by the court. In response to this rule (the first notice of the proceeding appellant had had) he appeared in the cause and filed numerous objections to the verdict (R., pp. 15 and 16). Other land-owners similarly affected filed objections to the verdict (R., p. 7).

The effect of these objections was to render the verdict of the jury of seven a mere nullity, and to necessitate proceedings *de novo* by a jury of twelve. The language of the statute is so clear as to leave no room—no pretext even—for any other hypothesis.

> "SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between

them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury."

Under this section the verdict of a jury of seven is merely tentative; it becomes a nullity "if the proper authorities or any owners of the land are dissatisfied" with it. On the incoming of objections the court is powerless to pass upon the reasonableness of the exceptions, or confirm or reject the verdict, for the law is mandatory, and says when dissatisfaction with such a verdict is indicated "the marshal *shall* be ordered to summon a second jury of twelve," etc. The matter of awards of damages and assessments of benefits, as found by a jury of seven, and whether reasonable or grossly excessive, is not the subject of review by the court. That is left by the statute to rest exclusively with the proper authorities and the land-owners. If they are satisfied, the verdict stands; if either is dissatisfied, the marshal shall summon a second jury of twelve, and their verdict shall be recorded as *final and conclusive* (sec. 264).

And it had been so held by the Court of Appeals one week before the bill in this cause was filed in the case of

Brown *vs.* Macfarland, 19 App. D. C., 525.

That case arose under an act of Congress approved March 3, 1899, for the widening and extension of Sherman avenue. The act directed that the proceedings should be conducted under and in accordance with chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, chapter eleven being made up of the sections referred to in the act of February 10, 1899, as sections 257 to 267, under which were had the proceedings now being considered.

In the Brown case, on the incoming of the verdict of the

jury of seven, Brown filed objections thereto, as did other land-owners. These objections were overruled by the District Court and Brown appealed. The Court of Appeals, speaking by the late Chief Justice Alvey, held that when dissatisfaction was expressed with the verdict of a jury of seven, proceeding under chapter 11, R. S. D. C., the submission of the matter of condemnation to a jury of twelve was an "express mandate of the statute which the court could not disregard" and it was the duty of the authorities to have a second jury summoned.

The learned Chief Justice added (pp. 530, 531):

> "The owners of land proposed to be condemned are placed in the position of defendants or opponents of the proceeding of condemnation; and, consequently, all affirmative acts prescribed by the statute in perfecting the proceeding must be shown to have been complied with by the parties authorized to take and prosecute the proceeding. The whole proceeding is strictly statutory, and it must be affirmatively shown that all the provisions of the statutes that apply to the proceedings have been substantially complied with. Otherwise the whole proceeding would be *void and without effect.*"

It was also so held in

Macfarland *vs.* Byrnes, 19 App. D. C., 531.

It thus appears that when Briscoe filed his bill the District Commissioners, without regarding the judgment of the court as to which they must have been advised, were threatening to sell his property for a tax illegally levied, and no part of which was due. A clear case, therefore, was presented for the interposition of equity, and this court has so held in numerous cases.

One of these cases is

Wilson *vs.* Lambert, 168 U. S., 611.

This was a suit brought by a property owner to restrain the Rock Creek Park Commissioners from *levying* an assessment on his lands adjoining the park for supposed benefits accruing to the lands from the location of the park, under section 6 of an act approved September 27, 1890. The charge of the bill was that this section of the act was unconstitutional and void, and an injunction was therefore prayed against the levying by the Commissioners of an assessment on the property of complainants. The Court of Appeals, affirming a decree of the late Justice Cox in the court below, held that the section in question was unconstitutional, and that the Rock Creek Park Commissioners should be perpetually enjoined from proceeding under it. In its opinion the Court of Appeals exhaustively reviewed the decisions of this court touching the jurisdiction of equity in similar cases, and found in favor of such jurisdiction.

Referring to this feature of the case, this court says (pp. 612, 613):

> "Courts of equity undoubtedly have jurisdiction to hear the complaints of those who assert that their lands are about to be assessed and subjected to liens by a board or commissioners acting in pursuance of the provisions of a statute which has been enacted under the forms of law, but which is unconstitutional, and therefore does not avail to confer the powers sought to be exercised (Dows *vs.* Chicago, 11 Wall., 108; Union Pac. Railway *vs.* Cheyenne, 113 U. S., 516; Ogden City *vs.* Armstrong, 168 U. S., 224; Dillon's Mun. Corporations, vol. 2, sec. 922, 4th ed.).
>
> "Accordingly if, in the present case, the sixth section of the act of September 27, 1890, entitled 'An act authorizing the establishment of a public park in the District of Columbia,' and upon which the defendants rely for their authority to act, is, indeed, unconstitutional and void, for all or for any of the reasons urged against it, we think that the complainants are entitled to a remedy by a direct proceeding in a court of equity. For the reasons mentioned in

> the cases above cited and in numerous others, the remedy at law could not be regarded as plain and adequate."

But this court "having reached the conclusion that the sixth section of the Rock Creek Park act is not invalid for want of conformity to constitutional principles, we think it follows that the decree of the court below should be reversed and the bill of complaint dismissed."

In other words, had this court reached the conclusion, as did the Court of Appeals, that the sixth section was invalid "for want of conformity to constitutional principles," the action of the equity court in taking jurisdiction of the cause and enjoining the proposed assessment would have been upheld.

In his brief, at page 7, the Corporation Counsel says that the appelant could have prevented a cloud from being cast on his title by the threatened sale "by paying the assessment under protest and suing at law to recover the amount paid if the tax were illegal."

That this of itself is a distinct head of equity jurisdiction in tax cases—where the only legal remedy is an action to recover back the money—is in terms decided in

Railway Company *vs.* Cheyenne, 113 U. S., 525.

> "It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere irregularity of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, *if the legal remedy consisted only of an action to recover back the money* after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of

> a tax sale would be a mischief hard to be remedied. *Even the cloud cast upon his title by a tax under which such a sale could be made would be a grievance which would entitle him to go into a court of equity.*"

Under the tax laws in force in the District of Columbia in 1902, a purchaser at a tax sale paid the amount of his bid and received from the proper official a tax-sale certificate in every case. On a showing that the tax for which the sale had been made was illegal and invalid, this court has held that the holder of the certificate may be enjoined from setting up any claim under it in

Lyon *vs.* Alley, 130 U. S., 177.

Certain lots in the city of Washington belonging to Alley, the plaintiff, had been sold to Lyon, the defendant, and tax-lien certificates issued to him. The predicate of the tax sale was default in the payment of a special-improvement tax for setting the curbstone and paving the footways and gutters along the front line of the property. The bill charged that the improvement tax was illegal and invalid, and that the certificates were issued without authority of law. The relief asked for was a decree declaring the tax sale void and an injunction against Lyon from setting up any right, title, or claim by virtue of the certificates issued to him on his purchase. A decree was entered in the court in general term in accordance with the prayer of the bill, from which decree an appeal was taken by Lyon.

In disposing of the case the court, speaking by Mr. Justice Lamar, said:

> "But it is contended that even if we adopt the conclusion reached by the court below, as to the illegality of the tax sale and the nullity of the certificate issued to the appellee, still the case made by the appellee does not show such a cloud upon his title as calls for relief from a court of equity. In other words, that

when the illegality of a tax sale is patent upon the face of the proceedings, as is the case as to the sale here complained of, the jurisdiction of a court of equity to remove a cloud does not attach. The case of Hannewinkle *vs.* Georgetown, 15 Wall., 547, cited by counsel, fails to support the contention that such is the law of this court. That case was not a suit to remove a cloud from a title. The complainant filed a bill to enjoin the collection of a tax, alleged to be illegal, and the court decided that there was no remedy in equity to enjoin the collection of a tax upon the sole ground of its illegality.

"It is a well-settled doctrine in this court that equity will not interpose to arrest the proceedings for the collection of a tax upon the sole ground of its illegality. It is equally well settled by the decisions of this court and the State courts that, after the land has been sold and a conveyance of some sort made to the purchaser, courts of equity have inherent jurisdiction to give relief to the owner against vexatious litigation and threatened injury to the market value of the land, by removing the cloud which such illegal sale, and the illegal claim arising from it, may cast upon the title, and in such case of damage, either existing or apprehended, equity will interpose for relief, even during the progress of the proceedings before the sale."

In the case under consideration appellant seeks to enjoin the District Commissioners from selling his land to enforce collection of an illegal tax. In the case last cited the sale was set aside because the Commissioners had done just that thing. Can it be that equity may *undo* a wrong that it is powerless to *prevent?* All the more necessary is it that equity should interfere in this jurisdiction to prevent the sale of lands for illegal taxes, because all of the laws relating to taxation in this District since 1878 provide that a deed from the Commissioners, in pursuance of a tax sale, shall be *prima facie* evidence of a good and valid title, and that "the manner of levy, notice, sale, and all other prerequisites of

law were complied with necessary and proper to make such a deed and title valid."

Abert's Compilation, title "Taxation," sections 42 and 66.

The act of Congress approved February 28, 1898 ("An act in relation to taxes and tax sales in the District of Columbia"), the law in force in April, 1902, when the Commissioner's undertook to make sale of appellant's lot, also says:

> "A deed shall be given by the Commissioners of the District of Columbia or their successors in office to the purchaser at said tax sale, his heirs or devisees, or to the assignee of such certificate, which deed shall be admitted and held to be *prima facie* evidence of a good and perfect title in fee simple to any property bought at said sale herein authorized."

It would thus appear that a tax-sale certificate, improperly issued by the Commissioners, must occasion great loss and expense to the property owner—a charge to which he should not be subjected except through some fault or shortcoming of his own. Of course, if the District Commissioners had occupied towards appellant's land the relation which was generally assumed by those chronic litigants of the common law—John Doe and Richard Roe—whose sole and only occupation was meddling with the title to lands in which they had no interest, there might be some justification for selling lands as for default in the payment of taxes not yet due. But the duties of the office of District Commissioner do not require such interventions in suits to quiet title to lands between individuals, and by the same token they ought not to be permitted to create strife between the owners of land and holders of tax-lien certificates in cases where it must appear at a glance that the Commissioners have no shadow of right or claim, legal or equitable, to interfere in the premises.

The equity court dismissed the bill for want of jurisdiction and without inquiring into the validity of the assessment. The Court of Appeals confirmed the decree of dismissal on the ground that the assessment was valid and without considering the question of jurisdiction. In neither the equity court nor in the Court of Appeals was any attention paid to appellant's complaint that the District Commissioners were seeking to enforce by the sale of appellant's property the collection of $1,000, not one cent of which was due at the time public notice was given of the proposed sale. On this ground alone, if for no other, the bill should have been retained and a perpetual injunction awarded. Even assuming that the Court of Appeals is right in holding the assessment regular and valid, the law gave appellant a certain time within which to pay it voluntarily, and until that time expired no sale of his property could properly be made by the District Commissioners.

## II.

## The Case as Presented for Final Hearing.

An examination of the record discloses that the bills were filed on the *14th* of April, restraining orders issued the same day, and a rule to show cause made returnable on the *23d* of April. This to enable the Commissioners to move for a discharge of the restraining orders before the tax sale of that year should be finished. But they entered no appearance in the cause until May 7, 1902, when they rested content with filing a general demurrer. The tax sales for the year had been completed and the primary purpose of the bill—the restraint of an attempted illegal tax sale—was accomplished. In other words, the District authorities tacitly admitted the right of the appellant to an injunction against the advertised sale.

The next step taken by the District Commissioners was to procure the passage of the act of July 1, 1902 (32 Statutes, 616), under which all benefit assessments are made payable in five equal annual installments, the first installment within sixty days after the confirmation of the verdict. Under this the assessment of $1,000 against appellant fell due March 27, 1905. But no effort was thereafter made by the District Commissioners to collect the assessment by compulsory processes, and it was still unpaid when the appellant's bill was dismissed.

A few days before the restraining order was issued in this case, the Court of Appeals had announced in Brown's case that after exceptions filed to the verdict of the jury of seven, "the whole proceeding would be void and without effect" unless a jury of twelve was summoned as directed by the statute.

Subsequently, and on the 18th of April, 1905, the Court of Appeals held in the case of *Saunders* that the act of the District Court in confirming the verdict of a jury of seven was a *void* act and conferred no authority on the Commissioners to collect an assessment predicated of such a verdict so confirmed. Still the Commissioners took no further steps in the right direction—that is, to summon a jury of twelve.

Without setting down the demurrer for hearing, the District Commissioners made answer to the bill June 15, 1903, more than a year after it was filed. Issues were joined on this answer. The Commissioners, however, continued to carry the said assessment of $1,000 as a charge against appellant's land, and although averring in their answer to the bill that it was their duty to collect the same by compulsory processes, as provided in the act of July 1, 1902, they did not include this lot in their annual tax sales pamphlet issued in March, 1907. Thereupon an agreed statement of facts was entered into and filed in April, 1907, and on this and the bill and answer the final hearing was had in the equity court.

That court dismissed the bill as for want of jurisdiction, on the theory that nothing was complained of in the bill except the illegality of the tax, holding that: "Appellant had no right to go into a court of equity and ask the court to take out of the District Court questions which that District Court could settle and, under the law, was the proper channel to settle the very questions presented by the bill" (R., p. 24).

The charge of the bill, that the tax was not due and payable when its enforced collection was attempted by the District Commissioners by a sale of the appellant's property, was not considered by the equity court.

From this decree so dismissing the bill as for want of jurisdiction, an appeal was taken. To this question of jurisdiction the arguments of counsel were mainly directed in the Court of Appeals, to which was added, as an incident, the further argument that, having once taken jurisdiction of the subject-matter of the bill, the equity court should have proceeded to award complete relief by declaring the assessment complained of illegal and void.

The decree of the equity court was passed and the appeal taken on the 3d day of July, 1907. Two years before the Court of Appeals had decided that an order of the District Court, confirming the verdict of the jury of seven, proceeding according to chapter eleven, sections 257 to 267, of the Revised Statutes of the District of Columbia, over objections by the land-owners, was *void*, and therefore in excess of jurisdiction, and not *voidable* only, and as such *error*.

Counsel naturally supposed that the Court of Appeals would adhere to its ruling then so recently made in an identical case, without further argument, and assumed that the only question left open for consideration was the jurisdiction of the equity court to entertain the bill.

But the Court of Appeals did not refer in its opinion to the question of jurisdiction, except to say that its consideration was unnecessary in view of the conclusions reached as

to the validity and regularity of the assessment (R., p. 33). Instead, the opinion of the court deals entirely with the effect of appellant's objections to the verdict of the jury of seven. Commenting on this feature of the case, the court says (R., pp. 30 and 31):

> "It is to be remembered, however, that in the case at bar the party had offered objections to the verdict, which were not withdrawn or waived, and there can be no presumption, therefore, in favor of the regularity of the order of confirmation, as in the case quoted from. This difference between the two cases presents a good reason for the reconsideration of the question. It is conceded that sec. 263 made it the duty of the court, when the objections were offered to the verdict, to empanel a new jury of twelve for the purpose of reassessing the damages and benefits. It defines the duty of the court, but does not, in terms, at least, declare that the court shall have no other or further jurisdiction in the premises; nor does it declare that such an order of confirmation shall be void, though, as we have seen in the cases referred to above, such an order of confirmation has been referred to as void."

And again at page 33:

> "Appellant was in court and gave notice of appeal from the order, and took his appeal. Had he prosecuted the same the result would have been the reversal of the order for error committed."

In other words, that in passing the order of confirmation the court committed error only and did not exceed its jurisdiction.

But in so doing the court entirely lost sight of its own ruling, made in 1905, on a precisely similar state of facts, wherein it was held that such an order was not "merely voidable" (or error), but "void" (as being in excess of jurisdiction).

For convenience of comparison, the language of the court in the two cases referred to is set out in parallel columns:

| *Saunders'* case, 25 App. D. C., 438, 442 (decided April 18, 1905): | *Briscoe's* case, 32 App. D. C., 167 (decided. November 16, 1908): |
|---|---|
| "Were all the provisions of such statutes substantially complied with? If not, under the authority of the case last referred to (Brown *vs.* Macfarland), we must hold that the decree or order of October, 1901 (the order confirming the verdict), was not merely voidable, but void, by reason of the fact that it is not controverted that the second jury of twelve was not summoned as required by the statute applicable to the proceeding." | "While it (the court) acted contrary to law in not ordering a reassessment by new jury, its order of confirmation is not void, but erroneous, and voidable only." |

In its opinion the Court of Appeals pronounces that the Supreme Court of the District of Columbia is a court of general jurisdiction, and therefore had power to confirm the verdict of the jury of seven over objections. This proposition is echoed by the corporation counsel at page 14 of his brief. In reply it is only necessary to say that, although the Supreme Court of the District of Columbia may be a court of general jurisdiction, it was not therefore given power to condemn the property of private citizens for public use. Jurisdiction to do this was conferred specially by statute, the act of February 10, 1899. There would have been no need of a statute if the court could have proceeded as well by virtue of its general jurisdiction. The powers given the court by the statute were limited and clearly defined. These empowered the court to empanel first a jury of seven; then, if dissatisfaction was expressed by the land-owners, the

statute directed that there must be a jury of twelve. As was well said by the late Chief Justice Alvey (Brown *vs.* Macfarland, *supra*), and in reply to the argument of corporation counsel that it was not necessary for the Commissioners to ask a jury of twelve *"to support such a contention, we should be required to disregard the express mandate of the statute."*

If the Supreme Court of the District of Columbia, by virtue of its "general jurisdiction," could dispense with a jury of twelve, it could just as effectually dispense with a jury of seven and "organize" some other agency or tribunal for the condemnation of the lands, awarding the damages and making the assessments than that designated in the act of February 10, 1899.

But this whole question was exhaustively considered by Chief Justice Alvey when Brown against Macfarland, the first case wherein the point was raised, came before the Court of Appeals:

> "It is urged that the appellants did not, in terms, demand that the second jury of twelve should be ordered, and therefore the court was justified in ratifying the verdict of seven. But it must be borne in mind that it was not the duty of the appellants, as owners of lands proposed to be condemned, to demand a summoning of a second jury. The statute does not require it of them. That is the duty of the authorities authorized to institute and prosecute the proceedings of condemnation to completion. The owners of the lands proposed to be condemned are placed in the position of defendants or opponents of the proceeding of condemnation; and, consequently, all affirmative acts prescribed by the statute in perfecting the proceeding, must be shown to have been complied with by the parties authorized to take and prosecute the proceeding. The whole proceeding is strictly statutory, and it must be affirmatively shown that all the provisions of the statutes that apply to the proceedings have been substantially complied with. Otherwise the whole proceeding would be void and without effect."

In the opinion of the Court of Appeals in this case it is not "distinguished" from the *Saunders* case, which is not referred to except to say that it had been cited in the briefs of counsel, though the conclusion of the one is exactly the reverse of the conclusion of the other. Nor was the ruling of the court in Brown's case referred to, on the point at least that if the verdict of the jury of seven be confirmed over objections the effect will be that "the whole proceeding would be void and without effect."

We thus have two judgments of the Court of Appeals to the effect that an order of the Supreme Court of the District of Columbia confirming the verdict of the jury of seven over objections goes to *jurisdiction* and is void, and one judgment that is *error* only and as such voidable. This necessarily creates conflict and confusion. *There are many cases still pending in the courts of the District wherein that, now, is the sole question involved. It is of the utmost importance, therefore, to the people of the District, whose lands are burdened with benefit assessments, that the question now fairly presented should be finally disposed of.*

On page 14 of corporation counsel's brief, this sentence occurs:

> "The bill was filed in the equity court a few days after the Court of Appeals handed down its opinion of April 1, 1902, in Brown against Macfarland (19 App. D. C., 525) holding that it was unnecessary to demand a second jury of twelve."

The purpose of this interpolation is not clear, unless interposed by way of excuse for the failure of the District Commissioners to order a second jury in this case. But this the Court of Appeals had held was an indispensable prerequisite to further proceedings.

Chapter 11 of the Revised Statutes of the District of Columbia received the consideration of this court in the case of Bauman *vs.* Ross, 167 U. S., 573.

The many laws of Congress relating to the condemnation of land in the District of Columbia, needed for public roads, were exhaustively considered by the late Mr. Justice Gray, who, after quoting the language of chapter XI with regard to the verdict of a jury of seven, says (p. 572):

> "If the court or any land-owner was dissatisfied with that verdict, the matter might be submitted to a jury of twelve, proceeding as before, the verdict of whom, or a majority of whom, was final."

Succinctly stated, the case as presented by the bill, answer an agreed statement of facts sought to enjoin the Commissioners from selling his property as advertised because—

*a.* No part of the tax was due.

*b.* The tax was predicated of an assessment made by the verdict of a jury of seven, confirmed by the court over objections thereto by the appellant.

At the time of the presentation of the case, the Court of Appeals had decided, without a discordant note, in several cases, the first in 1902 and the last in 1905, that after objections to such a verdict had been filed the court was without jurisdiction to do aught else than order a jury of twelve, "otherwise the whole proceeding would be void and without effect."

Thus the law had been interpreted by the courts when appellant's appeal was taken. Upon this interpretation, acting under the advice of counsel, he relied. The bill was prepared hurriedly, as is generally the case when an injunction is sought against an impending grievance. No time was given to examine the serious constitutional questions presented, but section 17 of the bill sufficiently avers that the law is unconstitutional because if the assessment is enforced "it will be in effect the taking of complainant's property without due process of law" (R., p. 4).

In his exceptions to the verdict, paragraph 4, the appellant says that the assessment of $1,000 charged against his prop-

erty "is greatly in excess of the benefits, if any, which respondent denies, actually accruing to his said property by reason of the extension of said Rhode Island avenue" (R., p. 16). This is nowhere controverted in the pleadings, and the case is here squarely on the proposition that the assessment complained of is "greatly in excess of" the special benefits accruing to the appellant, and is, "to the extent of such excess, a taking of private property for public use without compensation."

## III.

## Reply to the Minor Points Made in the Motion to Dismiss.

Taking these in the order in which they appear in the brief of Corporation Counsel:

"*The verdict of the jury of seven became inoperative because of the general exceptions of the appellant. This claim was never made in the District Court case*" (Brief, p. 7).

The mere filing of exceptions to a verdict of a jury of seven, *ex propriore vigore*, rendered such a verdict inoperative and void under section 263. These exceptions were necessarily filed in the District Court case, and thereupon the law prescribed the consequence without "claim" in that behalf by the property owner—the marshal *shall* be ordered to summon a second jury of twelve: "otherwise the whole proceeding would be void and without effect" (*Brown vs. Macfarland*).

*"The assessment is void because no time of payment is stated in section 5 of the act to extend Rhode Island avenue. This was cured by the act of July 1, 1902"* (Brief, p. 9).

The bill did not charge that the assessment was void for any such reason. The appellant complained because the Commissioners had advertised his land for sale in default of the payment of an assessment of $1,000, not one cent of which was due. This was in April, 1902, and the Corporational Counsel seeks to justify this unwarranted act by showing that a curative act was passed July 1, 1902, to which he seeks to give an *ex post facto* effect.

*The appeal should be dismissed for want of "assignments of error," as required by sections 997 and 1012 of Revised Statutes of the United States* (Brief, p. 12).

This court has uniformly held that "writ of error will not be dismissed for want of jurisdiction by the failure to annex thereto or return therewith an assignment of errors pursuant to the requirements of section 997, Rev. Stat."

School District of Ackley *vs.* Hall, 106 U. S., 428.

See also

Gumbel *vs.* Pitkin, 113 U. S., 547.
United States *vs.* Pena, 175 U. S., 502.

In perhaps a great majority of cases presented in this court there is no assignment of errors in the record. Such assignments generally appear for the first time in the briefs of appellants or plaintiffs in error.

In the case of

Columbia Heights Realty Co. *vs.* Rudolph, 217 U. S., 547,

no assignment of errors was returned in the record. There was a full assignment, however, in the brief of counsel, and it is submitted that the assignment of errors in this brief discloses "plain error which obviously demands correction."

*It is also contended by the Corporation Counsel that the appeal should be dismissed because of the laches of the appellant in failing to secure an order for a second jury and in prosecuting his suit to remove the threatened tax sale.*

This same objection has been made several times before by the Corporation Counsel and always decided adversely to the contention. On the point the Court of Appeals say in Macfarland *vs.* Saunders, 25 App. D. C., 442.

> "This being so, this appellee, having filed his exceptions, was under no obligation to do more. No second jury having been caused to be summoned by the Commissioners, the decree or order of October 2, 1901, could not be enforced against this appellee, and no laches could be predicated against him, no matter how long he waited. He could move at any time, or he could wait until an attempt was made to enforce it, and then resist such an enforcement so far as it related to his property. For the reasons stated, and upon the authorities cited, the decree was void against this appellee."

*The appellant is estopped to claim that the act to extend Rhode Island avenue is unconstitutional because of the stipulation of counsel referred to at page 27 of the record* (Brief, p. 16).

The "counsel for said Briscoe," mentioned in this stipulation, after filing exceptions to the verdict, taking an appeal from the order of confirmation and entering into the "stipulation," did nothing further. When the sale of appellant's property was threatened, other counsel were employed who had had no part in the making of the record prior to that time.

As has been pointed out, the appeal of Briscoe was from an order void because in excess of the jurisdiction of the court. It is now contended, with apparent seriousness, that

a stipulation to dismiss such an appeal, either shortly after it was begun or at any time afterwards, for any reason, estopped Briscoe from ever claiming in any tribunal having jurisdiction of the matter that the order was void. Had the assessment been in an amount sufficient to give this court jurisdiction of the case, and the case had been brought here on appeal by Briscoe from the order confirming the verdict of the jury of seven, the result must have been a declaration that the order complained of was a mere nullity, with a further declaration that no constitutional question was necessarily involved in the appeal.

When the verdict of the jury of seven was confirmed over objections on the 27th day of January, 1900, in the District Court proceeding, the case of Davidson against Wight was pending in the Court of Appeals on an appeal by Davidson, a property-owner, from an order of the District Court, passed November 18, 1899, confirming the verdict of a jury of seven in the S Street extension proceeding. The appeal of Briscoe was taken on the 27th of January, but was not perfected, as required by the rules of the Supreme Court of the District of Columbia, and his right to perfect the appeal was gone long before the 29th day of April, 1901, when the decision of this court was handed down in the Wight-Davidson case. The January, 1900, term of the District Court ended on the first Monday of the July following, so no advantage could possibly have accrued to Briscoe, even if this court had affirmed the Court of Appeals in the Wight-Davidson case, for this court has held that the Supreme Court of the District of Columbia cannot set aside, even on a plain showing of fraud, accident, or mistake, its final judgments after the close of the term at which they were entered.

Phillips *vs.* Negley, 117 U. S., 665, 672.

Wherefore the stipulation, in so far as Briscoe was concerned, was the merest *nudum pactum*, from which he could by no possibility derive any benefit or advantage.

But the judgment of this court in the Wight-Davidson case left the District of Columbia in identically the same position as it was in before the stipulation was entered into—that is, it still had a right to ask for a jury of twelve, but it had no other right if it desired to prosecute the work of condemnation to completion, in view of the objections taken to the verdict of the jury of seven. So the legal status of the parties was in no way changed.

Meanwhile, the District had done nothing because of the stipulation and had left nothing undone. In no way was its position altered to its prejudice, and an estoppel can only arise from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged. In the stipulation Briscoe's counsel agreed that he would "abide by" the decision of this court in the Wight-Davidson case. To "abide by," as used in the stipulation, can only mean that Briscoe would acquiesce in and not dispute the judgment of this court in the Wight-Davidson case. This he has done, and he has never in any tribunal, and does not now, challenge the correctness of the final judgment in that case; but this should not estop him from contending that there are in the present appeal propositions of law that were neither considered nor decided in the Wight-Davidson case.

In the case under consideration, the language of the act defining the zone of assessment is very different from that considered by the court in the Wight-Davidson case, and the constitutional question now presented was not raised in that case.

The wording of the two laws, in so far as it relates to the assessment of benefits, is for convenience placed in parallel columns:

The S street act (passed March 3, 1899):

"That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said street, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces or parcels of ground situated and lying on each side of the extension of said street, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said street, as herein provided."

Rhode Island avenue act (passed February 10, 1899):

"That of the amount found due and awarded as damages for and in respect of the land condemned under this act for the extending of said avenue, one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground situate and lying on each side of said Rhode Island avenue extended, between Florida avenue, Maple avenue, Linden street, and Le Droit avenue; and also those contained in squares eighteen and nineteen and the south half of square twenty in the recorded addition to Le Droit Park; and also those contained in blocks one and two, and the northwest corner lot of block seven in the subdivision known and designated as Bloomingdale; and also against so much of that tract of land known and designated as the David Moore tract as lies west of North Capitol street."

In the S street case the zone of assessment is coterminous with the boundary lines of the District, and the act does not require that one-half of the amount awarded as damages shall be assessed against any particular pieces or parcels of land, but "also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said street." Under this the jury could estimate benefits and assess accordingly.

The Rhode Island Avenue act directs that one-half of the amount (no more, no less) awarded as damages shall be assessed against certain designated pieces or parcels of land within a very narrow radius. And this assessment must be made whether the doomed territory, or any of it, is actually benefited or not by the proposed extension. In fact, in section 3, directing the assessment, the word "benefit" does not occur. All that the jury could do, after ascertaining the value of the land taken, was to apportion one-half of the amount among some twenty-five pieces of land. This was rather a process in arithmetic than an assessment of benefits.

Appellant contends that this assessment was "greatly in excess" of the benefit accruing to him from the extension, and that therefore the act of February 10, 1899, as it is now sought to be enforced, is unconstitutional as to him.

This point was not raised or decided in the Wight-Davidson case, and without doing violence either to the letter or spirit of the stipulation of his attorneys in the District Court case to "abide by" the decision of the Supreme Court in the Wight-Davidson case, appellant may properly set up any matter of defense that did not occur in that case. He should not be held to "abide by" something that was not in the Wight-Davidson case, even if any effect is given to his failure to prosecute an appeal from a void order—a "something that does not bind or include anybody" (R., p. 31).

The brief from which the corporation counsel quotes was addressed to the Court of Appeals on other than the constitutional questions involved. All that was stated in that brief—that Briscoe would abide by the decree of this court in the Wight-Davidson case—he has done, but his contention is that after giving the fullest effect to the decision of this court, pronouncing the law in that case constitutional, there is still another and a much stronger reason why the act of February 10, 1899, should be held unconstitutional.

The Court of Appeals in its opinion did not even refer to the stipulation, but directly decided that "the objection to

the constitutionality of the act of Congress under which the condemnation of lands and the assessments of benefits were effected in this case is untenable" (R., pp. 29 and 30).

This raises the question which this court is now asked to review.

IV.

**The order of the District Court confirming the verdict was in excess of jurisdiction and void because on filing objections to the verdict of the jury of seven, the statute, section 263, expressly secured to the appellant the intervention of a jury of twelve.**

This question has already, necessarily, been considered in discussing the question of jurisdiction of equity in such cases. It is elementary, being nothing more nor less than an insistence by the appellant that he be accorded the right to a jury of twelve.

There is no room for uncertainty in the language of the act and no need of judicial interpretation. The words used are simple, direct, and imperative. To quote again:

> "SEC. 263. If the proper authorities, or any owners of the land, are dissatisfied with the verdict thus rendered, and no agreement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury."

"No arrangement" was made between the appellant and the authorities in respect of his expressions of dissatisfaction. On the contrary he still insists on these objections.

As was said by Mr. Ch. J. Alvey in *Brown vs. Macfarland, supra,* the summoning of a jury of twelve in such case is an "express mandate of the statute" which can be dispensed with only by an agreement in writing to waive a jury of twelve.

This question was set at rest for all time, as was supposed, by Mr. Ch. J. Marshall, in 1828, in the case of

Elmore *vs.* Grimes, 1 Peters, 468:

> "The court has had this case under its consideration, and is of opinion that the circuit court had no authority to order a peremptory non-suit against the will of the plaintiff. He had a right by law to a trial by jury, and to have had the case submitted to them. He might agree to a non-suit; but if he did not so choose the court could not compel him to submit to it."

In Morgan's Executor *vs.* Gay, 19 Wallace, 81, 83, the proposition is thus stated:

> "We may notice another error which will doubtless be avoided should there be a second trial. Issues of fact appear to have been made up which were determined by the court in the absence of the defendant's counsel, and without any written agreement to waive a jury trial. This was irregular. In the absence of such an agreement, and of the defendant's counsel, it was *not competent* for the court to try the issue without the intervention of a jury."

So here, it was not competent for the District Court to proceed with the work of condemnatoon in this case, without the intervention of a second jury—a jury of twelve.

Some of the questions involved in this appeal were brought to the attention of this court in the case of

Macfarland against Brown, 187 U. S., 239.

This was an appeal from the Court of Appeals taken by the District Commissioners from the judgment of that court

reported in 19 App. D. C., 525. The bill was dismissed because the judgment appealed from was not final. This court, however, in its opinion states that the provisions of section 263, "which provide for a second jury," are "important questions and we can well understand why those who are entrusted with the administration of the law are anxious to have them speedily and finally determined."

Taxpayers, especially beneficiaries of benefits (?) in street extension cases, are now confronted with irreconcilable judgments of the Court of Appeals on these "important questions," and they are anxious that they be speedily and finally determined by this court, as between the conflicting decisions of the court of appeals which have been pointed out.

## V.

**The act of February 10, 1899, is unconstitutional for that it authorizes an assessment of appellant's property to meet the cost of public improvement in substantial excess of the special benefits conferred by the improvement, and to the extent of such excess confiscates appellant's property to public use without compensation.**

On the third of March, 1899, two acts were passed for the extension and widening of many existing streets. No uniform rule was followed in fixing the zone of assessments for benefits. To the contrary, all proceeded on a different theory as will appear by the following analysis:

*S Street, 22d Street and Decatur Street:* not less than one-half of the damages against "the pieces or parcels of ground situate and lying on each side of the extension of said streets and also on any and all adjacent pieces or parcels of land which will be benefited."

*Staughton Street:* one-half of the damages "against those pieces or parcels of ground abutting on both sides of Staughton Street and the extension thereof as herein provided."

*Eckington Place:* on abutting land and extending to a depth of 200 feet.

*Sherman Avenue:* at least one-half of the damages on each side of the street to a distance of 300 feet from the building line.

*Sixteenth Street:* not less than one-half the damages on land lying on both sides of the street to a depth of 200 feet.

*Eleventh Street:* at least one-half the damages on lands abutting the street to a depth of 200 feet.

It is difficult to comprehend how the benefit assessments should be limited to 200 feet in the case of Eleventh Street, and extended to 300 feet on Sherman Avenue, the next street on the east running north and south, or why, in the case of Sixteenth Street, the great thoroughfare of the city, these assessments should not extend more than 250 feet, while the benefits to accrue from the extension of Twentieth Street, a minor street, could be levied on any and all lands that might be benefited by the extension.

But the taxing area for the extension of Rhode Island Avenue as fixed by the act of March 30, 1899, is altogether unique. A map showing the city streets crossing and in proximity to the extension is appended to this brief. A glance at this map demonstrates that the assessments were not levied upon the principle of equality and uniform apportionment among the persons taxed. Nearness to the proposed improvement did not enter into the equation.

A detailed examination of the map in respect of the amounts to be assessed as specified by the act shows curious inconsistencies.

The lots in block 12 south of Rhode Island Avenue, fronting on Florida Avenue, are included in the taxing area, though some of these lots are more than 600 feet distant from the proposed extension, and had already been abun-

dantly provided with streets but the benefits to lots in block 12 north of Le Droit Avenue, extend only 260 feet.

Again, lots on the east side of Linden Street north of Rhode Island Avenue are assessed to a distance of 560 feet, while lots on the west side of the street directly opposite are not included in the taxing area.

Again, the square bounded by New Jersey Avenue, R Street, Fourth Street and Rhode Island Avenue escaped assessment for reasons not apparent.

But by far the most marked incongruity exists on the south side of Rhode Island Avenue at its intersection with First Street. Lots on the west side of First Street are assessed to a distance of 200 feet from the south side of the avenue. On the east side the limit of the assessment area is 100 feet. The only lot assessed in block seven is the "northwest corner lot," the property of the appellant. Against this a charge of $1,000 was placed. By some process in necromancy lots 35, 36, 37, 38, and 39 with a frontage of 100 feet on First Street, adjoining appellant's lots on the south, and lots 52, 53, 54 and 43, 44 and 45, with a frontage of 100 feet on T Street, adjoining appellant's lots on the east, were kept outside the zone of assessment. This could not possibly have happened if these assessments had been levied upon the principle of equality and uniform apportionment among the persons taxed, or if the matter had been left to a jury to take into consideration the situation of the lands near the proposed improvement and the benefits they might receive from the extension of said avenue.

How can it be that appellant's lot was benefited to the extent of $1,000, while the lands east and south of him, separated only by imaginary lines, received no benefit? Or why were the lots on the west side of First Street benefited to a distance of 200 feet from Rhode Island Avenue and those on the east side only to a distance of 100 feet? The reason is clear. Instead of leaving it to a jury to determine after viewing the premises and carefully considering what the

persons to be taxed might have to say with regard to special benefits likely to accrue to nearby lands from the proposed improvement, the legislature did this arbitrarily, by availing itself of "such information as it deemed sufficient either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether these estimates or conclusions had or had not any legal sanction" (125 U. S., 357).

The "others" on whom the legislature relied for "estimates or conclusions," must have been the owners of land next adjoining on the east and south the property of appellant. As interested parties seeking to avoid "benefits" their estimates and conclusions ought not to have been received with implicit reliance, at least not without "legal sanction." This demonstrates the danger of the dictum in Spencer against Merchant, "that the determination of the territorial district that should be taxed for a local improvement is within the province of legislative discretion" (125 U. S., 355). In other words, that in matters of benefit (?) taxation the legislature is unhampered by fundamental law, and that, therefore, if in the act of February 10, 1899, the Congress had decreed that the entire cost of the proposed improvement could be assessed upon abutting lands to a depth of 100 feet, the owners of such lands would not be heard to complain in any judicial tribunal. Thus the will, or whim or caprice, or as in this case, the seeming favoritism, of the legislature is the "due process of law" for depriving an individual of his property with or without compensation.

In the third section of the act of February 10, 1899, there is not a word or hint about benefits, but a peremptory direction to assess one-half of the damages on certain designated lands within a narrow radius. It would have more accurately indicated the legislative intent to have directed the jury to *apportion* one-half of the damages within the taxing area. This they were obliged to do under the law whether they found benefits or not. The sum to be thus apportioned was

$48,308.50. This, according to the verdict of the jury, was assessed against all the lands mentioned in the act. Apparently the only parcel benefited by the extension, according to the verdict of the jury, was a small section of the "David Moore tract," through which up to that time no public highways had been projected (R., p. 10).

No part of appellant's land was taken but an assessment of $1,000 was made against it by the verdict of this jury, and appellant excepted thereto because the amount was "greatly in excess of the benefits, if any, which respondent denies, accruing to said property by reason of the extension of said Rhode Island Avenue" (R., p. 15).

The theory underlying the doctrine of local assessments is that the value of the contiguous and adjacent property is enhanced by an improvement of a public character such as the opening and improving of streets and highways, the property thus receiving a special and peculiar benefit, not shared in by the property remote from the *locus* of the improvement. Upon such property, therefore, a part or the whole of the cost of such public improvement may fairly be assessed to an amount not exceeding the amount of such special and peculiar benefit. The owner of the property is no worse off by reason of the entire transaction, for the assessment takes from him no more than the benefit of the public improvement has conferred; or, to state it differently, the benefit conferred constitutes just compensation for property of which he has been deprived for public use.

From the many recent decisions of this court on this subject the following corollary is deducible:

*The cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; any substantial excess is a taking of private property for public use without compensation.*

To make this clear it will be necessary to review and analyze some of the leading cases.

Willard *vs.* Presbury, 14 Wallace, 676,

arose over an act of Congress authorizing the corporation of Washington to "levy taxes on particular wards, parts or sections of the city for their particular local improvements." The court held that assessments under this act for grading and paving a part of Fourteenth street, levied against property fronting the street, were valid.

Davidson *vs.* New Orleans, 96 U. S., 97:

The controversy in this case arose over an assessment on certain real estate made under statutes of Louisiana for draining swamp lands within the parishes of Carroll and Orleans.

Hagar *vs.* Reclamation Dist. No. 108, 111 U. S., 701:

In this case the act of the legislature of California for reclaiming swamp and overflowed lands and assessing the cost on the lands reclaimed or benefited was upheld.

In Spencer *vs.* Merchant, 125 U. S., 345,

the court, Mr. Justice Gray delivering the opinion, held that the legislature of New York "in the exercise of the power of taxation has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion" (355). (There was no contention in this case that the assessment exceeded the benefit conferred. Harlan, J., in French *vs.* Barber, &c., Co., 181 U. S., 361.)

(Mr. Justice Matthews and Mr. Justice Harlan dissented.)

Walston *vs.* Nevin, 128 U. S., 578,

arose over an assessment for "local improvements," though the report does not show the character of the improvements. The assessment was held valid.

Illinois, &c., Railroad *vs.* Decatur, 147 U. S., 190,

arose over an assessment for grading and paving a street. Held valid.

In Paulsen *vs.* Portland, 149 U. S., 30,

the court upheld an assessment to pay for the cost of a sewer in the city of Portland.

Mattingly *vs.* The District of Columbia, 97 U. S., 687,

arose over assessments for special improvements (grading, sidewalks, and setting curbs) in the city of Washington under an act of Congress. The assessment was sustained.

In Bauman *vs.* Ross, 167 U. S., 548,

there came up for consideration the act of Congress to provide a permanent system of highways in the District of Columbia, and more particularly section 15 of the act, which provided that one-half of the amount awarded as damages for lands taken "shall be charged upon the lands benefited by the laying out and opening" of the highway or reservation, and that an assessment should be made "against each parcel which it shall find to be so benefited its proper proportionate part of the whole of said one-half of the damages." In an elaborate opinion delivered by Mr. Justice Gray the court held the act was capable of enforcement and that it contained no provision "inconsistent with the Constitution."

(All of the judges concurred in this opinion.)

It will be noticed that no taxing district was established by the act of Congress in question, but the assessments were to be "charged upon the lands benefited by the laying out and opening" of the proposed public improvements.

In Parsons *vs.* The District of Columbia, 170 U. S., 45,

the question was as to the validity of an act of Congress which provided for establishing in the District a comprehensive system regulating the supply of water and the erection and maintenance of reservoirs and water mains. The legislation was upheld.

These cases may be arranged under three heads:

First. Those that concern the drainage and reclamation of swamp lands;

Second. Those that concern the repair and improvement of streets and the installation of sewers, sidewalks, curbs, and water mains;

Third. Those that have to do with the acquisition of lands by proceedings in eminent domain.

The judgments of the courts under the first and second heads invoke the exercise of police powers in subserving the health and comfort of the community no less than the sovereign right of taxation. In the street repair and improvement cases the decisions were rested partly on the theory that the work was part of the "system" prescribed for the community at large. Besides, as was said in Mr. Brandenberg's case, "the legislature would be warranted in assuming that grading and paving streets in a good-sized city commonly would benefit adjoining land more than it would cost. The chances of the cost being greater than the benefit is slight, and the excess, if any, would be small. This and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation" (205 U. S., 139).

In Bauman *vs.* Ross one of the questions was as to the power of Congress to levy special assessments imposing upon the lands benefited the amount awarded by the court as damages for each highway or reservation condemned or es-

tablished under the act, but the assessment was to be charged only upon lands actually benefited, and, of course, only to the extent of benefits actually conferred. The act did not require that one-half of the damages awarded be apportioned arbitrarily among the owners of land within a limited radius irrespective of the benefits to such lands.

But in Spencer *vs.* Merchant the court lays down the broad proposition (though it seems to have been *obiter*) that the legislature may, in the exercise of the power of taxation, direct that the whole or part of the expense of a public improvement be assessed upon the owners of land benefited thereby, and determine the territorial district in which the assessment shall be placed. *In this case no question arose as to the excess of the cost of the improvement there in question over the special benefits.*

And Mr. Justice Harlan says in his dissenting opinion in French *vs.* Barber Asphalt Paving Co. (181 U. S., 361) that he agreed with the conclusion of the court in Spencer *vs.* Merchant "because no question arose as to an excess of cost of the improvement there in question over special benefits."

In the same dissenting opinion he says of Parsons *vs.* The District of Columbia (170 U. S., 361): "But the court took care to add 'and there is no such disproportion between the amount assessed and the actual cost as to show any abuse of legislative power.' The words thus added are significant, and if they had not been added the opinion would not have passed without dissent. The words referred to justify the conclusion that if there had been an abuse of legislative power; that if the amount assessed had been substantially or materially in excess of the cost of the work, or of the value of the property assessed, or of the special benefits received, the owners of the abutting property might justly have complained of a violation of their constitutional rights."

The question before the court was as to the constitu-

tionality of a statute validating what had been judicially determined to be a void assessment. The report does not show that there was any complaint by the land-owner that his property was not benefited to the full amount of the assessment and more, or, in other words, that he was not getting *just compensation* for what was taken from him for public use.

However much the courts may differ as to the constitutional meaning and value of the phrase "due process of law," all agree that "it means that there can be no proceeding against life, liberty, or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of our private rights" (per Field, J., in Hagar *vs.* Reclamation District). And it is a rule founded upon the first principles of natural justice older than written constitutions that the citizen shall not be deprived of life, liberty or property without an opportunity to be heard in defense of his rights.

But in this case Congress assumed the burden, without notice of any sort to appellee or giving him an opportunity to be heard in defense of his rights. From such legislation, it is contended, there can be no appeal to the courts as in all other cases of the taking of private property for public use. This seems to be tantamount to saying that though property itself may not be taken for public use without just compensation, deprivation may be accomplished by indirection—by arbitrarily imposing an assessment or lien under which the property may be sold.

*And here the contention of the authorities is that although they may not take for uses of a public street the lands of A without compensation, they may make A's neighbors, B, C, and D, pay the price of the land, though they get nothing in return.*

It is a principle that underlies all forms of government by law that a citizen shall not be deprived of life, liberty or property without "due process of law." The legislature has no power to take away a man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him and for a full opportunity of time, place and tribunal to be heard in defense of his rights. This constitutional guaranty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty or property, whether the proceeding be judicial, administrative or executive. The only hearing accorded to the appellee from the beginning to the end of the scheme for widening and extending Rhode Island avenue—from the time the bill authorizing the extension was introduced in the House of Representatives until his land was advertised for sale for non-payment of the assessment—is the very scanty right to be heard upon the question of the proportion he should pay of a gross arbitrary assessment. That is accorded to him apparently as an idle form, for even in respect to that limited point, if he cannot be heard on the question of benefit received, the hearing is practically nugatory.

In this case the legislature, without notice to appellant, after having arbitrarily decreed that the land-owners should pay into the District treasury a sum of money, afterwards ascertained to be $48,308.50, invited them to go before the jury of seven and scramble among themselves over the ratio of apportionment. With the result of this controversy the District has no concern, for the jury must assess at least one-half of the amount against the several pieces or parcels of land designated by the act, even though such assessment might be in substantial excess of accruing benefits.

Norwood *vs.* Baker, 172 U. S., 269:

That case arose out of the condemnation of certain lands for the purpose of opening a street in the village of Nor-

wood, a municipal corporation in the State of Ohio. The principal question presented involved the validity of an ordinance of the village assessing upon Mrs. Baker's lands abutting on each side of the new street an amount covering not simply a sum equal to that paid for the land taken for the street, but, in addition, the cost and expenses of the condemnation proceedings. The strip condemned belonged entirely to Mrs. Baker and it was estimated by the jury as being worth $2,000, which was paid to the owner. It was adjudged by the court that the village have immediate possession and ownership of the strip for the new street.

Shortly after the finding of the jury was returned, the village council passed an ordinance levying an assessment on lands of Mrs. Baker on both sides of the new street for an amount equal to the cost of the land and the expense of the condemnation proceedings, amounting in all to $2,218.58. There was no pretense that this sum bore any relation whatever to the benefits accruing to the land-owner from the opening of the new street.

As in the case now under consideration, the land-owner brought suit to obtain a decree restraining the village from enforcing the assessment in question against her property on the ground that the assessment complained of was in violation of the Fourteenth Amendment of the Constitution, forbidding any State from depriving a person of property without due process of law. By decree of the circuit court the village was perpetually enjoined from enforcing the assessment. From this decree the village appealed to this Court, where the decree was affirmed, one justice dissenting. The opinion of the court, delivered by Mr. Justice Harlan, thoroughly discusses the principles of law applicable to this case and exhaustively considers the decisions of this Court and the State courts bearing on the question. In the course of his opinion he reaches the following conclusion:

> "Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening

public highways in front of their property—such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements."

* * * * * * *

"But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property-owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received.

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public

> use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

The next case wherein the right to impose special assessments received the consideration of this court is

French *vs.* Barber Asphalt Paving Co., 181 U. S., 324:

This was a suit instituted by the paving company to enforce a lien of certain special tax bills against the property of Margaret French and others, issued by the city of Kansas City in part payment of the cost of paving a street on which the property abutted. Under the city charter the lien of the tax bills was enforceable by a suit against the owners of the land. On the part of the property-owners it was contended that the cost of the paving was charged against their lands "according to the frontage without reference to any benefits to the property on which the charge was made and the special tax bills levied." The report does not show whether or not the property-owners contended that the charge substantially exceeded the benefits conferred by the public improvement. The controversy arose entirely over the *cost of paving* and did not *involve the purchase of land* for a needed public improvement. In other words, it was a case where the "legislature (or the common council of Kansas City) would be warranted in assuming that grading and paving streets in a good-sized city commonly would benefit adjoining land more than it would cost" (per Holmes, J., in Mr. Brandenberg's case, 205 U. S., 139).

Commenting on Norwood *vs.* Baker, the court say, Mr. Justice Shiras delivering the opinion:

> "That was a case where by a village ordinance, apparently aimed at a single person, a portion of whose

property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the costs and expenses of the condemnation proceedings, was thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and to a majority of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power. This court, however, did not affirm the decree of the trial court awarding a perpetual injunction against the making and collection of any special assessments upon Mrs. Baker's property, but said:

"It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of the opening of the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the State."

This is the proposition now contended for—that the amount assessed should equal and not exceed the benefit actually conferred. But the conclusion reached in terms condemns an assessment levied without "due and proper inquiry" as to the "special benefits accruing to the property."

It will be noticed that the distinguished jurist calls attention to the fact that it was a "case whereby a village ordinance apparently aimed at a *single person* a portion of whose property was condemned," &c., &c. But suppose the abutting property upon which the act of confiscation was

imposed had belonged to two or more owners. What difference in principle could that have made, especially as the Constitution says that *no* person shall be so despoiled? It would be but poor consolation to a man whose property was being taken away from him, and nothing given in return, to say that his next-door neighbor was being treated in exactly the same way.

"The due and proper inquiry" as used in the opinion would seem to require an inquiry into the question of benefits before some tribunal where a property-owner might appear in defense of his rights and not rest upon the will of the legislature, without notice to the person whose property is to be taken for public use. A taking of private property for public use by a special assessment as for benefits conferred by a special improvement is not a legislative but a judicial question upon which the parties in interest are entitled to be heard and have their day in court.

Mr. Justice Harlan (with whom concurred Mr. Justice White and Mr. Justice McKenna) delivered a vigorous dissenting opinion and for the following reason (p. 353):

> "But I am quite sure, from the intimations contained in the opinion, that it will be cited by some as resting upon the broad ground that a legislative determination as to the extent to which land abutting on a public street may be specially assessed for the cost of paving such street is conclusive upon the owner, and that he will not be heard, in a judicial tribunal or elsewhere, to complain even if, under the rule prescribed, the cost is in substantial excess of any special benefits accruing to his property, or even if such cost equals or exceeds the value of the property specially taxed. The reasons which, in my judgment, condemn such a doctrine as inconsistent with the Constitution are set forth in Norwood *vs.* Baker, and need not be repeated."

At the same term, and on the same day, the case of Wight *vs.* Davidson, 181 U. S., 371, was decided.

This was an appeal from this court. The case arose under the act of Congress, also approved on the 3d day of March, 1899, authorizing the extension of S street and other streets, and more particularly over the clause of that act making provision for the award of damages and the assessment of benefits. This clause is as follows:

> "*And provided further*, That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets not less than one-half thereof shall be assessed by the jury in said proceeding against the pieces or parcels of land situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided."

But in this case the assessments were to be made only against lands actually benefited.

Cooley and Dillon are in accord.

> "There can be no justification for any proceeding which charges the land with an assessment greater than the benefit; it is a plain case of appropriating private property to public use without compensation."
>
> Cooley on Taxation, 3d ed., 1255.

> "It is clear that any assessment is wrong which charges lands with a sum beyond the benefits received. If the cost of any improvement exceeds the local and peculiar benefit, the improvement should either not be made at all or the excess should be assessed on the public and become part of the general levy."
>
> *Id.*, 1260.

> "As has been well said, to compel individuals to contribute money or property to the use of the public without reference to any common ratio and without

requiring the sum paid by one piece or kind of property or by one person to bear any relation whatever to that paid by another, is to lay a forced contribution not a tax within the sense of those terms as applied to the exercise of powers by any enlightened and responsible government."

*Id.*, 1224.

"The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies."

*Id.*, 1154.

"But since the period when express provisions have been made in many of the State constitutions requiring *uniformity and equality of taxation*, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that special *benefits actually received* by each parcel of contributing property, was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must upon principle be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury."

2 Dillon Mun. Corp., 4th edition, 936.

Brandenburg *vs.* District of Columbia, 205 U. S., 135,

is one of the latest decisions of this court on what is styled in the opinion of the court "the difficult question with which we have been concerned."

The question discussed in Mr. Brandenburg's case arose over an assessment for widening an alley under recent acts of Congress. The constitutionality of the acts was assailed because the jury was authorized "to appraise the damages to real estate" and also to "apportion an amount equal to the amount of said damages so ascertained and appraised as aforesaid, 'including fixed pay for marshal and jury, according as each lot or part of lot of land in such square may be benefited by the opening, widening, extending and straightening such alley,' with certain deductions."

The court says, Mr. Justice Holmes delivering the opinion:

> "The law is not a legislative adjudication concerning a particular place and a particular plan like the one before the court in Wight *vs.* Davidson, 181 U. S., 371. It is a general prospective law. The charges in all cases are to be apportioned within the limited taxing district of a square, and therefore it well may happen, it is argued, that they exceed the benefit conferred, in some case of which Congress never thought and upon which it could not have passed. The present is said to be a flagrant instance of that sort. If this be true, perhaps the objection to the act would not be disposed of by the decision in Louisville & Nashville R. R. Co. *vs.* Barber Asphalt Paving Co., 197 U. S., 430. That case dealt with the same objection, to be sure, in point of form, but a very different one in point of substance. The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good-sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the

Fourteenth Amendment, a system of delusive exactness and merely logical form.

"But when the chance of the cost exceeding the benefit grows large and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights, like others, are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain. So it might well be that a form of assessment that would be valid for paving would not be valid for the more serious expenses involved in the taking of land. Such a distinction was relied on in French *vs.* Barber Asphalt Paving Co., 181 U. S., 324, 344, to reconcile the decision in that case with Norwood *vs.* Baker, 172 U. S., 269.

"And yet it is evident that the act of Congress under consideration is very like earlier acts that have been sustained. That passed upon in Wight *vs.* Davidson, it is true, dealt with a special tract, and so required the hypothesis of a legislative determination as to the amount of benefit conferred. But the real ground of the decision is shown by the citation (181 U. S., 378, 379), of Bauman *vs.* Ross, 167 U. S., 548, when the same principle was sustained in a general law (167 U. S., 589, 590). It is true again that in Bauman *vs.* Ross, the land benefited was to be ascertained by the jury instead of being limited by the statute to a square; but it was none the less possible that the sum charged might exceed the gain. As only one-half the cost was charged in that case, it may be that on the practical distinction to which we have adverted in connection with Louisville & Nashville R. R. Co. *vs.* Barber Asphalt Paving Co., the danger of such an excess was so little that it might be neglected, but the decision was not put on that ground.

"In view of the decision to which we have referred it would be unfortunate if the present act should be declared unconstitutional after it has stood so long. We think that without a violent construction of the statute it may be read in such a way as not to raise

> the difficult question with which we have been concerned. It is true that the jury is to apportion an amount equal to the amount of the damage ascertained, but it is to apportion it 'according as each lot or part of lot of land in such square may be benefited by the opening, etc.' Very likely it was thought that in general, having regard to the shortness of the alleys, the benefits would be greater than the cost. But the words quoted permit, if they do not require, the interpretation that in any event the apportionment is to be limited to the benefit, and if it is so limited all serious doubt as to the validity of the statute disappears."

This decision is put distinctly on the ground that there was nothing in the record to show that the jury did not limit the assessment to the benefit actually conferred, thus adhering to the principle announced in Norwood *vs.* Baker. With such a safeguard we get back to the sounder doctrine of the fathers—that "the right of acquiring, possessing, and protecting property * * * is not *ex gratia* from the legislature, but *ex debito* from the Constitution."

In the last case on this subject

> Columbia Heights Realty Company *vs.* Rudolph, 217 U. S., 547,

the opinion only touches the much-vexed question involved in this bill by reference to the case of Wight *vs.* Davidson.

From this synopsis it appears that this court has settled the broad proposition that Congress has the right, in the exercise of the power of taxation in the District of Columbia, to "direct that one-half of the amount of the compensation or damages awarded to the owners of lands appropriated to the public use for a highway shall be assessed and charged upon the District of Columbia, and the other half upon the lands benefited thereby within the District, in proportion to the benefit, and may commit the ascertainment of the lands to be assessed, and the apportionment of the benefits

among them to the same tribunal which assesses the compensation or damages" (Bauman *vs.* Ross, 167 U. S., 549).

The law under consideration in that case provided "that one-half of the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act, shall be charged upon the lands benefited by the laying out and opening of such highway or reservation, or part thereof, and the remainder of said amount shall be charged to the revenues of the District of Columbia" (*Id.*, p. 558).

The language of the act for the extension of S street, considered in the Wight-Davidson case, is somewhat different, though the same in substance:

> "that of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces or parcels of ground situate and lying on each side of the extension of said street, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided" (181 U. S., 372).

The language of the act (June 6, 1900) under consideration in the Columbia Heights Realty Co. *vs.* Rudolph was also slightly different, though practically the same:

> "SEC. 2. That of the amount found to be due and awarded as damages for and in respect of the land condemned, as herein provided, such amount thereof shall be assessed by the jury hereinafter provided, as benefits, and to the extent of such benefits, against those pieces or parcels of land on each side of (the extended street) and also on any or all pieces or parcels of land which will be benefited by the extension."

In all three of these cases by the express language of the several acts the assessments are in express terms limited to the benefits conferred.

In

Brandenburg *vs.* The District of Columbia, 205 U. S., 135,

the court held that although the cost of paving a street might be charged against the abutting property on the theory that the "legislature would be warranted in assuming that grading and paving streets in a good-sized city commonly would benefit adjoining lands more than it would cost" * * * "it might well be that the form of assessment that would be valid for paving would not be valid for more serious expenses involved in the taking of land." But the court concluded in that case that the words of the act then under consideration "permit, if they do not require, the interpretation that in any event the apportionment is to be limited to the benefit."

In the case now under consideration a different proposition is presented. It is this: Has Congress the power to declare that one-half or all of the cost of the land condemned for a public highway in the District of Columbia shall be apportioned among certain designated parcels of land irrespective of benefits, or, as in appellant's case, *greatly in excess of benefits?* This court strongly pronounces against such a proposition in *Norwood vs. Baker,* but scattered here and there in the opinions of this court in several cases (markedly in Spencer *vs.* Merchant) are general expressions which might admit of such an interpretation. If this is to be the law for the people of the District of Columbia, in the language of Mr. Justice Harlan, in his dissenting opinion of Wight *vs.* Davidson:

> "If Congress can, by direct enactment, put a special assessment upon private property to meet the entire cost of a public improvement made for the benefit and convenience of the entire community, even if the amount so assessed be in substantial excess of special benefits, and therefore, to the extent of such excess, confiscate private property for public use without

compensation, it should be declared in terms so clear and definite as to leave no room for doubt as to what is intended" (181 U. S., 388).

*Norwood vs. Baker* marks a distinct era in the history of benefit legislation for the District of Columbia. When the decision was handed down in that case in December, 1908, the street-extension bills, subsequently passed on the 10th day of February and the 3d day of March, 1899, were pending before the District committees of the House and Senate. These bills were passed before the principles enunciated in that case were fully appreciated by the Congress, but they were the last enactments wherein it was provided that at least one-half, or any other part, of the cost of the land needed for a proposed widening or extension of a city street should be arbitrarily apportioned among nearby lands, irrespective of benefits.

Congress went even further, for when the acts of March 3, 1899, were assailed in court because of this most unjust and inequitable assessment feature, amendatory and remedial acts were passed.

The act for the extension of Eleventh street required one-half of the damages to be arbitrarily assessed against land within two hundred feet of the street. This provision was challenged in court, the assessment was set aside, and an act of Congress passed on the 6th of June, 1900, directing that a reassessment should be made "as benefits and to the extent of such benefits." This act received the consideration of this court in *Columbia Heights Realty Co. vs. Rudolph, supra.*

The act relating to Sherman avenue, also passed March 3, 1899, was challenged for the same reason and a remedial act was passed June 29, 1906 (32 Statutes, 630), providing for a reassessment of benefits and directing that such reassessment be made "under and in accordance with the terms and provisions of the act approved June 6, 1900."

In the case of this particular street the Court of Appeals has ratified an assessment under the act of March 3, 1899, as to some of the lands affected and an assessment under the act of June 6, 1900, as to all others of the lands so affected. On what Mr. Justice Holmes designates the "difficult question with which we have been concerned" the decisions of the Court of Appeals have not been uniform throughout the entire length of one short street.

In more recent legislation on the subject Congress has adopted a uniform system for the condemnation of lands for streets in the District of Columbia, all in accord with the principles announced in *Norwood vs. Baker*. The later laws provide that of the amount found due and awarded as damages, "plus the cost and expenses of the proceedings, such amount shall be assessed by the jury as benefits, and to the extent of such benefits, against the lots, pieces, or parcels of land on each side of the street * * * and against any and all other lots * * * which the jury may find will be benefited by the opening." * * *

But the property owners along the line of Rhode Island avenue were not favored with any such remedial legislation. They therefore went into equity and invoked the ægis of *Norwood vs. Baker*. This was denied them by the Court of Appeals, though, in order to reach its conclusion, that court ignored or overlooked its own previous judgments in other cases identical as to the legal questions involved. Unless this court corrects this plain error of the Court of Appeals, "which obviously demands correction," appellant will be deprived of his property without that just compensation which the Constitution guarantees.

For these reasons it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
*Attorneys for Appellant.*

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Office Supreme Court, U. S.
FILED.
APR 5 1911
JAMES H. McKENNEY,
CLERK.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

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## No. 141.

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ARTHUR BRISCOE, APPELLANT,

*vs.*

HENRY B. F. MACFARLAND ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLEES.

**MOTION TO DISMISS OR AFFIRM.**

EDWARD H. THOMAS,
*Corporation Counsel, Attorney for Appellees.*

SUPREME COURT OF THE UNITED STATES.

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Now come Cuno H. Rudolph, John A. Johnston, and William V. Judson, Commissioners of the District of Columbia, substituted as appellees by order of the court, and move the court to dismiss the appeal taken in this case or to affirm the judgment of the Court of Appeals of the District of Columbia on the following grounds:

First. The appeal should be dismissed because there is no assignment of errors as required by section 997 of the Revised Statutes of the United States.

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## BRIEF FOR APPELLEES ON MOTION TO DISMISS OR AFFIRM AND ON THE MERITS.

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EDWARD H. THOMAS,
*Corporation Counsel, for Appellees.*

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

## No. 141.

ARTHUR BRISCOE, APPELLANT,

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HENRY B. F. MACFARLAND ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

## BRIEF FOR APPELLEES ON MOTION TO DISMISS OR AFFIRM AND ON THE MERITS.

### Statement of the Case.

By stipulation of counsel filed in the case of Dennis C. Shea, appellant, against the Commissioners of the District of Columbia, No. 140, October term, agreement was made that the record therein shall not be printed and that said case is to abide the decision of the court in this case. A motion to dismiss or affirm has also been filed in the Shea case.

The questions are the same in both cases and each case involves a sum of money less than the jurisdictional amount required by law.

the David Moore tract included in said taxing district is only eight hundred fifty ($850) dollars for one property embracing more than three hundred thousand square feet, and one hundred fifty dollars on another lot containing about sixty thousand square feet more or less or the said assessment on the last-named lots being at the rate of less than one-third of one cent per square foot; and this notwithstanding the fact that the said last-named property is much of it closer to the said avenue than is the property of the respondent, and at least to the extent of one hundred thousand square feet thereof, is benefited equally as much as is the property of this respondent, in addition to the benefits accruing to the remainder of said tract, if the said property and the property of this respondent are to be deemed as benefited at all by the extension of said Rhode Island avenue, which this respondent wholly denies.

"4. That the said assessment of one thousand (1,000) dollars made by said verdict against the said property of this respondent is greatly in excess of the benefits, if any, which respondent denies, actually accruing to said property by reason of the extension of said Rhode Island avenue.

"5. Because this respondent had no notice, either actual or constructive of the pendency of these proceedings in so far as they purport to relate to his aforesaid lot of land, and had no opportunity of being heard by the said jury in respect of the said assessment.

"6. That the awards made by the verdict of said jury for property taken for the purpose of the extension of said Rhode Island avenue are largely in excess of the value of said property as will readily be seen by a comparison of the amount of said award with the values at which said properties have been returned for taxation.

"For which said several reasons and for others apparent upon the record, this respondent submits that the said verdict, award, and assessment are wholly void, and that the same should be vacated and set aside."

The agreed statement of facts also states:

> "Objections, similar in character, to the said verdict, were filed in the cause by other owners of lands against which benefits were assessed. Arguments were had before the district court on these objections, and the same were overruled and the verdict confirmed on the 27th day of January, A. D. 1900.
>
> "The complainant took an appeal from the order ratifying the verdict, but the appeal was not prosecuted."

Under sections 263, 264, and 265 of the said Revised Statutes provision was made for a second jury of twelve, if the proper authorities or any owners of land are dissatisfied with the verdict of the jury of seven, the verdict of the second jury to be final and conclusive, but if the amount assessed by the second jury be not greater than the amount assessed by the first, the costs of the second jury "shall be paid by the parties objecting to the first verdict."

Afterwards, on April 25, 1900, the Court of Appeals decided the case of Davidson *vs.* Wight, 16 App. D. C., 371, in which an act to extend S street, similar to the act to extend Rhode Island avenue, was held to be unconstitutional and void. This decision was reversed on April 29, 1901, in Wight *vs.* Davidson, 181 U. S., 371. In district court case No. 544 counsel filed, on June 11, 1900, a stipulation as to the prosecution of the appeal from the judgment confirming the assessment of benefits against appellant's lot (Direction for Preparation of Transcript, item 6, Record, page 26).

This stipulation could not be found, and its contents have been supplied by a new stipulation in this case (Record, page 27), which reads as follows:

> "It is hereby agreed between counsel for appellant and appellees herein that the missing stipulation entered into between counsel for said Briscoe and the corporation counsel, filed June 11, 1900, in district

> court case No. 544, under which proceedings were conducted for the extension of Rhode Island avenue, recited that said Briscoe, and Frank S. Collins and Eugene E. Gaddis had taken an appeal from the order passed in said cause No. 544, on the 27th day of January, 1900, confirming the verdict of the jury of seven, to the Court of Appeals of the District of Columbia, and that said appeal should abide by the decision of the Supreme Court of the United States in the case of Wight *vs.* Davidson, then pending, and since decided and reported in 181 U. S., 371."

With the decision of this court made April 29, 1901, all litigation ceased respecting appellant, as far as any proceeding in district court case No. 544 is concerned. The judgment in that case assessing benefits against appellant's property has never been modified or reversed and is still in full force and effect.

The cause for the institution of the equity suit now before this court on appeal arose by virtue of an advertisement of the collector of taxes that appellant's property would be sold for this assessment and other taxes at a tax sale to commence on the 8th day of April, 1902 (Agreed Statement of Facts, Record, page 17).

The appellant sought to restrain this sale by his bill on the equity side of the Supreme Court of the District of Columbia on the 14th day of April, 1902, in cause No. 23239. This bill sets forth briefly the proceedings in district court case No. 544, and claims in paragraph 17 (Record, bottom of page 4) that the act to extend Rhode Island avenue is unconstitutional. The bill alleges:

> "17. That the complainant is further advised by counsel that the said law under which the aforesaid proceedings were had and taken is unconstitutional and void because the prescribed assessments are not uniform and equal throughout the taxing district, and that any enforcement thereof will be in effect a

taking of this complainant's property without due process of law."

Other objections not jurisdictional nor involving error in the district court case were made by the bill as follows:

The verdict of the jury of seven became inoperative because of the general exceptions of the appellant. This claim was never made in the district court case.

The assessment is void because no time of payment is stated in section 5 of the act to extend Rhode Island avenue. This was cured by the act of July 1, 1902 (32 Stats., 616).

That the assessment cast a cloud on the title to appellant's property. This he could have avoided by paying the assessment which was legally due or he could have paid under protest and sued at law to recover the amount paid if the tax were illegal.

The appellant obtained a restraining order on the filing of the bill, which was not disturbed until final decree of the equity court, passed July 3, 1907, which discharged it (Record, p. 19).

Pending the equity case under the curative act mentioned the whole assessment became due and payable, although because of the appeal first to the Court of Appeals and then to this court the collection of the assessment has not been accomplished. On appeal to the Court of Appeals the decree of the Supreme Court of the District of Columbia was affirmed (Record, page 33); whereupon appellant prayed for and was allowed an appeal to this court (Record, page 34). This appeal is now before the court on motion to dismiss or affirm and also on the merits.

## Statutes Involved.

[Public—No. 43.]

*An Act to Extend Rhode Island Avenue.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Commissioners of the District of Columbia are hereby authorized and directed to commence suit for the condemnation of the land required for the extension of Rhode Island avenue from Florida avenue to Le Droit avenue within thirty days from the passage of this act, and the proceedings for such condemnation shall be under and according to the provisions of sections two hundred and fifty-seven to two hundred and sixty-seven of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of lands in said District for public highways.

SEC. 2. That payment of the sum or sums of money adjudged to be due and payable for lands taken under the provisions of this act shall be made by the Treasurer of the United States, *ex officio* commissioner of the sinking fund of the District of Columbia, upon the warrant of the said Commissioners, out of the revenues of the District of Columbia; and a sufficient sum to pay such judgments and awards is hereby appropriated out of the revenues of the District.

SEC. 3. That of the amount found due and awarded as damages for and in respect of the land condemned under this act for the extending of said avenue, one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground situate and lying on each side of said Rhode Island avenue extended, between Florida avenue, Maple avenue, Linden street, and Le Droit avenue; and also those contained in squares eighteen and nineteen and the south half of square twenty in the recorded addition to Le Droit Park; and also those

contained in blocks one and two, and the northwest corner lot of block seven in the subdivision known and designated as Bloomingdale; and also against so much of that tract of land known and designated as the David Moore tract as lies west of North Capitol street.

SEC. 4. That the sums to be severally assessed against each lot and piece or parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular piece or parcel of ground, the jury shall take into consideration the situation of such lots and each of them, and the benefit they may severally receive from the widening of said avenue. When the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof from the opening of said avenue, but such benefits shall be considered in determining what assessment shall be made on or against that part of such lot as is not taken, as is hereinbefore provided.

SEC. 5. That when confirmed by the court, the assessments made as aforesaid shall severally be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia have been collected since February twentieth, eighteen hundred and seventy-one, and shall be payable in five equal installments, with interest at the rate of four per centum per annum until paid.

SEC. 6. That payment of the awards made in respect of the property condemned under the provisions of this act shall not be made until the assessments herein provided for shall have been made against the aforesaid property and duly confirmed, and approved or affirmed by the court.

Approved, February 10, 1899.

30 Statutes, 834, 835.

*"Provisions of Sections Two Hundred and Fifty-seven to Two Hundred and Sixty-seven of the Revised Statutes of the United States Relating to the District of Columbia, Referred to in the Act to Extend Rhode Island Avenue.*

"SEC. 257. If any owner of land shall object and claim damages, and the amount cannot be agreed upon, the proper authorities shall direct the marshal of the District to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof.

"SEC. 258. It shall be the duty of the marshal, upon receiving the order mentioned in the preceding section, to give the owners not less than ten days' notice of the time and place of the meeting of the jury to assess their damages.

"SEC. 259. In cases where notice cannot be served on the owner, and in all cases where the land through which it is proposed to run a road shall belong to a minor or minors, it is presumed that objection is made, and damages shall be assessed accordingly.

"SEC. 260. The marshal shall summon the jury, and administer an oath or affirmation to them that they will without favor or partiality to any one, to the best of their judgment, decide what damage, if any, each owner may sustain by reason of running the road through his premises.

"SEC. 261. In making their decision the jury shall take into consideration the benefit such road may be to each owner by enhancing the value of his land, or otherwise, and shall give their verdict accordingly.

"SEC. 262. The jury, having been upon the premises and assessed the damages, shall make out a written verdict, to be signed by them, or a majority of them, and attested by the marshal, which the marshal shall transmit to the proper authorities at their next meeting, and which shall be recorded.

"SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury.

"SEC. 264. The verdict of the second jury, signed by each of the jurors, or a majority of them, shall be returned to the proper authorities at their next meeting and recorded as final and conclusive, and the road shall then be declared a public road, and opened as such.

"SEC. 265. In all cases where it becomes necessary to summon a second jury to assess damages, if the amount assessed by the second jury shall not be greater than the amount assessed by the first, the costs of the second jury shall be paid by the parties objecting to the first verdict; but if greater, they shall be paid by the District. All expenses up to the second jury shall be paid by the District.

"SEC. 266. The following fees are payable under the provisions of this chapter:

"*'Marshal's Fees.*

" 'For summoning each juror the marshal shall be entitled to fifty cents.

" 'For travel per mile, going and coming to the premises to be examined, twelve and a half cents.

" 'For each day's attendance, two dollars and fifty cents.

"*'Juror's Fees.*

" 'For each day's attendance, two dollars.'

"SEC. 267. In any case where materials of any kind shall be deemed necessary for making or repairing a public road, if the proper authorities cannot

> agree with the owner as to their purchase, such materials may be condemned in the same manner as provided for in this chapter in cases of condemnation of land for the purposes of a public road."

An act making appropriations to provide for the expenses of the Government of the District of Columbia for the year ending June 30, 1903, and for other purposes, approved July 1, 1902 (32 Stat., 590), provides as follows:

> "SEC. 5. * * *
> "In all cases where the assessments for benefits for street extensions *have been or may hereafter be levied,* payment of the same shall be made in five equal annual installments with interest at the rate of four per centum per annum from and after sixty days after the confirmation of the verdict and award: *Provided,* That the amount of any payment of any installment or installments heretofore made on account of any such assessment shall be credited thereon, and the balance shall be due and payable as if such assessment had been originally payable in the installments and with the interest as herein provided."

## ARGUMENT.

### Want of Assignments of Error.

The appeal in this case was allowed (Record, p. 34), but the transcript of the record does not contain an assignment of errors as required by sections 997 and 1012 of the Revised Statutes of the United States. Rule 35 of this court, which states that—

> "No writ of error or appeal shall be allowed until such assignment of errors shall have been filed."

has not been observed. There is no plain error not assigned

or specified, which, it is submitted, should induce the court to waive the provision requiring an assignment of errors.

> "It would seem that unless the statute and rule are to be entirely disregarded, this writ of error must be dismissed."
>
> Rowe *vs.* Phelps, 152 U. S., 87, 88.

Objection being made to the failure to assign error is also an additional reason for dismissing the case.

> Columbia Heights Realty Co. *vs.* Rudolph, 217 U. S., 547, 551, 552.

## Want of Jurisdiction.

If the district court in case No. 544 was without jurisdiction to confirm the verdict assessing benefits, nevertheless the appeal in this case should be dismissed, because no question under the Federal Constitution is involved and the amount of the assessment is less than $5,000, exclusive of interest and costs.

> "Jurisdictional limit upon writs of error and appeals to or from the Court of Appeals of the District of Columbia is $5,000, exclusive of interest and costs. See act of February 9, 1893, c. 74, 27 Stat., 434, 436."
>
> Wallach *vs.* Rudolph, 217 U. S., 561, granting motion to dismiss for want of jurisdiction.

It follows that the objections made in the bill, apart from any constitutional question, even if effective, do not give jurisdiction.

These objections are as follows:

First, that the verdict of the jury of seven became and was inoperative for any purpose (Bill, par. 8, Record, bottom of page 2); second, that the assessment is void because section 5 of the act to extend Rhode Island avenue does not pro-

vide when the assessment is payable (Bill, par. 9, Record, page 3), and, third, that the assessment casts a cloud upon the title of complainant (Bill, par. 10, Record, page 3).

These objections are, however, without merit.

The first noted objection is an afterthought. No such objection was suggested in the district court, whose judgment is collaterally attacked by this bill. The verdict of the jury of seven was confirmed on the 27th day of January, 1900 (Record, pp. 18 and 19). The bill was filed April 14, 1902 (Record, page 1). This bill was filed in the equity court a few days after the Court of Appeals handed down its opinion of April 1, 1902, in Brown *vs.* Macfarland (19 App. D. C., 525), holding that it was unnecessary to demand a second jury of twelve in terms.

The judgment of the district court confirming this assessment is not a nullity, because that court had general jurisdiction of the subject.

United States *vs.* Morse, 218 U. S., 493, 505.
*Ex parte* Watkins, 3 Pet., 193, 203.
*Ex parte* Parks, 93 U. S., 18, 20.

> "The judgment of condemnation in this case was rendered by a competent court, charged with a special statutory jurisdiction, and all the facts necessary to the exercise of this jurisdiction are shown to exist. A judgment thus obtained is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction.
>
> "If it were so, railroad companies would have no assurance that the steps taken by them to procure the right of way would conclude any one, and they would be constantly subject to vexatious litigation."
>
> Secombe *vs.* R. R., 23 Wall., 108, 119.
> Cuddy, petitioner, 131 U. S., 280, 284, 285.

Other cases are cited in the opinion of the Court of Appeals (Record, pp. 31, 32).

The second objection that the tax cannot be collected be-

cause no time for its payment is fixed in the statute is rendered ineffective by virtue of the curative act of July 1, 1902 (32 Stats., 616), providing for payment in five equal annual installments with interest, etc. The assessment is due under the curative act and its effect is to require the payment of interest from July 1, 1902.

Buchannan *vs.* Macfarland, 31 App. D. C., 6, 17, 23

The third objection that the assessment casts a cloud upon the title of complainant is untenable because the tax is due and payable.

> "One seeking to remove a tax levied as a cloud upon his title must tender payment or offer to pay any part thereof that may be admitted to be valid and collectible, in order to entitle him to relief against so much as may be illegal."
>
> Buchannan *vs.* Macfarland, 31 App. D. C., 6, 21.

By virtue of section 5 of the act to extend Rhode Island avenue this assessment became a lien on appellant's property.

The assessment is valid although under this act, excluding the curative act, the means of collection may have been ineffectual.

Todd *vs.* Macfarland, 20 App. D. C., 183, 184.
Wilkinson *vs.* D. C., 22 App. D. C., 289, 296, 297.

No injunction will be granted to stay the collection of taxes which the court can see ought to be paid.

State Railroad Tax Cases, 92 U. S., 575.

The whole tax, by virtue of the curative act, was due at the time when the restraining order was discharged, to wit, July 3, 1907 (Record, page 19), and it has remained unpaid.

This case is not here on error to reverse the judgment of the district court in case No. 544, and it is, therefore, thought unnecessary to review the decisions of the Court of Appeals

interpreting section 263 of the Revised Statutes relating to the District of Columbia set forth in the opinion of that court in this case (Record, page 30).

THE APPELLANT IS ESTOPPED TO CLAIM THAT THE ACT TO EXTEND RHODE ISLAND AVENUE IS UNCONSTITUTIONAL.

This estoppel is effected by the stipulation set forth in the agreement of counsel made in this case (Record, page 27):

> "It is hereby agreed between counsel for appellant and appellees herein that the missing stipulation entered into between counsel for said Briscoe and the corporation counsel, filed June 11, 1900, in district court case No. 544, under which proceedings were conducted for the extension of Rhode Island avenue, recited that said Briscoe, and Frank S. Collins and Eugene E. Gaddis had taken an appeal from the order passed in said cause No. 544, on the 27th day of January, 1900, confirming the verdict of the jury of seven, to the Court of Appeals of the District of Columbia, and that said appeal should abide by the decision of the Supreme Court of the United States in the case of Wight *vs.* Davidson, then pending, and since decided and reported in 181 U. S., 371."

It is submitted that the parties having agreed and elected to abide by the decision in Wight *vs.* Davidson, the constitutionality of the act to extend Rhode Island avenue is not open to question.

Eustis *vs.* Bolles, 150 U. S., 361.

Probably all questions affecting the validity of the assessment for benefits are foreclosed by this stipulation, as such was the intention of the parties.

Waiver of a constitutional question is sometimes placed on an implied contract to do so, sometimes on the ground of estoppel, and again as partaking of the nature of both.

Shepard *vs.* Barron, 194 U. S., 553, 565.

"Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up."

Shepard *vs.* Barron, 194 U. S., 553, 568.

The statute of New Hampshire providing for proceedings against mill owners to recover damages resulting from overflows of land caused by dams erected by them contained, among other things, a provision that "if either party shall so elect, said court shall direct an issue to the jury to try the facts alleged in the said petition and assess the damages, and judgment rendered on the verdict of such jury, with fifty per cent added, shall be final, and said court may award costs to either party at its discretion." In this case both parties elected trial by jury, which resulted in a verdict for damages for the defendant in error. *Held*, that the plaintiff in error, by availing itself of the power conferred by the statute, and joining in the trial for the assessment of damages, was precluded from denying the validity of that provision which prescribes that fifty per cent shall be added to the amount of the verdict, as the plaintiff in error was at liberty to exercise the privilege or not, as it thought fit.

Electric Company *vs.* Dow, 166 U. S., 489.

Approved in Minneapolis, etc., R. R. Co. *vs.* Gano, 190 U. S., 557; 23 Sup. Ct., 854; 47 L., 1183, affirming Gano *vs.* Minneapolis & St. L. R. R. Co., 114 Iowa, 728; 87 N. W., 719; 89 Am. St. Rep., 404, holding, where railroad takes land under power granted in Code, § 1995 *et seq.*, governing condemnation of land, it is precluded from questioning validity of section 2007, imposing payment of costs and attorney's fees as condition to exercise of power; Hale *vs.*

Lewis, 181 U. S., 473, 480; 45 L., 962; 21 Sup. Ct., 680, holding, where Wisconsin statute required loan associations to deposit securities with State treasurer for benefit of local creditors and Minnesota association made such deposit, State decision that stockholders had waived objection to statute as violating contract clause of Constitution was based on non-Federal ground.

> "A person may, by his acts or *omission to act,* waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and *the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one.*"
>
> Pierce *vs.* Somerset Railway, 171 U. S., 641, 648.

In McKinney *vs.* Carroll the heirs of one Moss recovered a judgment in ejectment against Carroll for a tract of land in the State of Kentucky. In accordance with the statute of that State commissioners were appointed to value the land in controversy and the improvements thereon. The commissioners made their return, and the court rendered a judgment against the plaintiffs in ejectment for a sum of money. The plaintiffs in error in this case, as sureties of the plaintiffs in ejectment, executed a bond to the defendant conditioned to pay the sum of money reported by the commissioners. Later an execution issued on the bond against the plaintiffs in error, who, by virtue of a statute, replevied the debt for two additional years. At the end of this time execution was issued against them on the replevin bond; whereupon they appealed to the court for a writ of error, alleging, among other things, that the State statute under which the replevin bond was given was in violation of the Constitution of the United States. The case was brought to this court by a writ of error to the Court of Appeals of Kentucky. **The court said:**

> "The jurisdiction of this court over this case was not questioned at the bar, but the question appears necessarily to arise on the record, and must, therefore, be decided by the court."

The fourth error in the petition draws into question the validity of the statute of Kentucky authorizing the defendants to give replevin bonds, payable in two years, upon the plaintiff's failing to cause to be indorsed on his execution that he would take the notes of certain banks specified in the act in discharge thereof. Had the plaintiffs in error paid the amount of the execution which issued against them on the improvement bond in money, as they were bound to do, this question would not have arisen. Having availed themselves of the benefit of the credit extended to them by that act, and delayed the defendant in error in the payment of the debt they had thus voluntarily again assumed upon themselves, is it proper that at the end of four years they should be permitted to come into court and set aside the whole proceedings against them on the abstract principle that the statute under which they had taken place violated the Constitution of the United States?

"The Court of Appeals of Kentucky have decided that the replevin bond cannot be set aside at the instance of the debtor, on the ground that the law under which it was given was unconstitutional."

M'Kinney *vs.* Carroll, 12 Peters, 66, 70.

See also

Wight *vs.* Davidson, 181 U. S., 371.
English *vs.* Arizona, 214 U. S., 359.

The real question before the Court of Appeals of the District of Columbia had no relation to any constitutional objection. That court states the proposition for consideration as follows:

"The serious question in this case had its origin in the order of the district court, in the condemnation proceeding, confirming the verdict returned therein, notwithstanding objections thereto had been filed by the plaintiff and others whose lands were affected."

(Record, top of page 30.)

Counsel for the Commissioners of the District of Columbia, in his brief in the Court of Appeals, contended that—

"The stipulation between counsel for Briscoe and the District of Columbia in District case No. 544, that his appeal should abide by the decision of the Supreme Court of the United States in the case of Wight *vs.* Davidson (181 U. S., 371), operates as an estoppel against him to assert that the assessments of which he complains are invalid, and he is in duty bound to pay them with lawful interest."

Counsel for Briscoe filed a brief in the Court of Appeals in reply to the above contention in which they said:

"When the verdict of the jury was confirmed, on the 27th of January, 1900, in condemnation cause No. 544, involving the extension of Rhode Island avenue, the case of Davidson *vs.* Wight was pending in this court, on appeal by Davidson, a property owner, from an order of the court below, passed November 18, 1899, confirming the verdict of a jury of seven in the S street extension proceeding. An appeal was then noted by Briscoe from the order of January 27, 1900, but not perfected, as required by the rules of this court, but the matter was kept open to abide the decision of this court in the Davidson case. This was handed down on the 25th day of April, 1900. This court held that the law was unconstitutional, and the District took an appeal to the Supreme Court of the United States.

"It then manifestly was to the interest of the District that the appeal of Briscoe be stayed until the United States Supreme Court considered the Wight-

Davidson case. Had Briscoe then prosecuted his appeal, this court would certainly have followed its own ruling in a former case and held the law unconstitutional. This in turn would have necessitated a second appeal by the District to the Supreme Court to test the identical question presented on its appeal in the Davidson case.

"The stipulation proposition apparently did not meet the approval of Briscoe's attorney, for it was not signed until the 11th day of June, 1900, nearly two months after the decision of this court was announced in Davidson *vs.* Wight (Briscoe Record, p. 19). The only purpose of the stipulation, in so far as Briscoe was concerned, was to save his point as to the constitutionality of the law, and it could not possibly have had any other or further effect. On the other hand, counsel for the District were saved the labor and expense of prosecuting a second appeal to the Supreme Court; so the stipulation was a matter of great convenience and accommodation to the corporation counsel.

"The stipulation provides that Briscoe's appeal should 'abide by' the decision of the Supreme Court in the Wight-Davidson case. Two questions were passed upon, and two only, in that case:

"(1) That the law was unconstitutional; and

"(2) That there was not due process of law in the case, because the assessments were made without notice to the property owners.

*"The law was held to be constitutional, and to that extent, of course, Briscoe is bound by the decree and must abide by it. This he has done."*

THE ACT TO EXTEND RHODE ISLAND AVENUE IS CONSTITUTIONAL.

Objection that the act to extend Rhode Island avenue is contrary to the Federal Constitution was made in paragraph 17 of the bill in these words:

"That the complainant is further advised by counsel that the said law under which the aforesaid pro-

> ceedings were had and taken is unconstitutional and void because the prescribed assessments are not uniform and equal throughout the taxing district, and that any enforcement thereof will be in effect a taking of this complainant's property without due process of law" (Record, bottom of page 4).

The objection made in the agreed statement of facts, made by Briscoe in the court of condemnation, to the confirmation of the verdict, award and assessment is thus stated:

> "That the act of Congress under which said proceedings were had is unconstitutional and void in that it fails to include in the property directed to be assessed for benefits accruing from the extension of Rhode Island avenue all the property within the taxing district defined in said act" (Record, top of page 16).

These questions were not argued in the Court of Appeals. Such objection was stated only in a narration of the objection and as an introduction to an argument by complainant's counsel in their original brief, that the objections to the verdict of the jury of seven made that verdict a nullity. That this act constituted due process of law and that Congress had power to fix and determine the area of assessment are questions affirmatively answered in the cases hereinafter cited.

In Wight *vs.* Davidson, 181 U. S., 371, the court said (at page 378):

> "The principal objections urged against the validity of the act are, first, because, as is alleged, it arbitrarily fixes the amount of benefits to be assessed upon the property, irrespective of the amount of benefits actually received or conferred upon the land assessed, by the opening of the streets; and, second, because it contains no provision for notifying the owners of the property to be assessed, in advance of such assessment, or at any time pending the consideration of the case by the jury."

Section 5 of the act construed in that case embraced the validity of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, while in the act to extend Rhode Island avenue the proceedings for condemnation are required to be under the provisions of sections 257 to 267 of the Revised Statutes of the United States relating to the District of Columbia, said sections being a part of said chapter 11.

In Bauman *vs.* Ross, 167 U. S., 548, the question of future benefits from the opening of a highway was considered and the court in effect decided that benefits which might result from the opening of a highway were properly assessable.

The act to extend Rhode Island avenue prescribes the land to be condemned as (sec. 1) "The land required for the extension of Rhode Island avenue from Florida avenue to Le Droit avenue." There is also a legislative determination of benefits (sec. 3) to the extent of one-half of the amount found due and awarded as damages, and the area of assessment is defined by the act. The jury are required (sec. 4) to determine and designate "the sums to be severally assessed against each lot and piece and parcel of ground," and (says the act) in determining what amount shall be assessed against any particular piece or parcel of ground, the jury shall take into consideration the situation of such lots and each of them, and the benefit they may severally receive from the widening of said avenue."

"The apportionment is to be limited to the benefit, and if so limited all serious doubt as to the validity of the statute disappears." Martin *vs.* District of Columbia, 205 U. S., 135, 140.

In the extension of Eleventh street the act provided:

> "That of the amount found to be due and awarded as damages for and in respect of the land condemned

> under this act for the extension of the said Eleventh street at least one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting that portion of the street to be opened, and extending to a depth of two hundred feet from the building lines of said Eleventh street as extended."

On writ of error this act was sustained in this court, section one of the act relating to S, Twenty-second, and Decatur streets being referred to as recited in Wight vs. Davidson.

The court said:

> "1. Did the court err in allowing an assessment of benefits under the act of June 6, 1900? We think not. Under the proceedings had theretofore under the act of March 3, 1899, c. 431; 30 Stat., 1344, there had resulted a condemnation of the land needed for the extension of Eleventh street northwest, and an assessment of damages sustained by the land owners, which award had been confirmed and the money paid. But that act provided 'that of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided.' Objection to this arbitrary fixing of the minimum amount to be assessed for benefits upon lots benefited by the opening of the street was considered, and the act sustained as within the complete jurisdiction which the United States possesses over the District of Columbia, in the case of Wight *vs.* Davidson, 181 U. S., 371. The benefits assessable under that act were separately found as against each parcel of property supposed to be benefited, but that part of the award of the

jury was vacated upon the erroneous supposition that the rule for assessment of benefits in the act was void."

Columbia Heights Realty Co. *vs.* Rudolph, 217 U. S., 547, 552, 553.

This case therefore sustains the power of Congress to fix the area of assessment and to make a legislative determination as to the amount of benefits conferred.

So, too, the benefits under the act to extend Rhode Island avenue were separately found as against each parcel of property benefited, and the jury found that said property "will be benefited by the extension of said Rhode Island avenue as set forth in schedule 2, hereto annexed, as part hereof" (verdict and award of jury, Record, pages 9 and 10; schedule No. 2, Record, middle of page 10, and order *nisi*, Record, page 11). The jury found the fact of benefit. The question of special benefit of assessment work and property to which it extends is one of fact. English *vs.* Arizona, 214 U. S., 359.

The act construed in *Wight vs. Davidson* provided that not less than one-half of the damages shall be assessed as benefits, and the act before the court in *Columbia Heights Realty Co. vs. Rudolph* declared that at least one-half of the damages shall be assessed as benefits. It is true that the act to extend Rhode Island avenue slightly differs from these acts by providing that one-half of the damages shall be assessed as benefits, but this difference is immaterial. The highway act (March 2, 1893, c. 197; 27 Stat., 532, sec. 15) also provided that one-half of the damages shall be assessed as benefits, and such provision was sustained in Bauman *vs.* Ross, 167 U. S., 548, 587, 588, 589.

"It is within the power of the legislature of the State to create special taxing districts, and to charge

the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, and it was not the intention of this court, in Norwood *vs.* Baker, to hold otherwise."

Webster *vs.* Fargo, 181 U. S., 394, 395.

See also:

Wight *vs.* Davidson, 181 U. S., 371.
French *vs.* Barber Asphalt Paving Co., 181 U. S., 324.
Parsons *vs.* D. C., 170 U. S., 45.
Walston *vs.* Nevin, 128 U. S., 578.
Spencer *vs.* Merchant, 125 U. S., 345.
Bauman *vs.* Ross, 167 U. S., 548.
Mattingly *vs.* D. C., 97 U. S., 687.
Shoemaker *vs.* U. S., 147 U. S., 282.
Hager *vs.* Reclamation Dist. No. 108, 111 U. S., 701.

The court below briefly considered the question of the constitutionality of the act to extend Rhode Island avenue and said:

"The objection to the constitutionality of the act of Congress under which the condemnation of lands and the assessment of benefits were effected in this case is untenable. Congress had the power to order the extension of the avenue, the condemnation of the lands necessary therefor, the designation of the taxing district for the assessment of benefits, and the giving of notice to the owners of land therein by publication. Wight *vs.* Davidson, 181 U. S., 371, 378, 381, 382; Bauman *vs.* Ross, 167 U. S., 548; Buchanan *vs.* Macfarland, 31 App. D. C., 6, 18. There is nothing in the record to indicate that the amount assessed against plaintiff's lot was actually in excess of the benefits accruing from the extension of the avenue, so as to bring the same within the principle governing the later case of Martin *vs.* D. C., 205 U. S., 135, 140" (Record, bottom of page 29 and top of page 30).

In a later case the Court of Appeals reviewed the decisions applicable to this case in sustaining the constitutionality of the act of March 3, 1899, providing for the improvement of Sherman avenue and the assessment of benefits against abutting property.

Macfarland *vs.* Umhau, 34 App. D. C., 109.

**Exercise of Jurisdiction by Courts of Equity on the Ground that a Tax is Unconstitutional.**

Even if the act to extend Rhode Island avenue be held to be contrary to the Federal Constitution, it does not follow that a court of equity will grant relief. The remedy at law is adequate. The Supreme Court of the District of Columbia held that the remedy at law was adequate (Record, page 21).

While this court has entertained equitable jurisdiction on the ground that the court may on proceedings in equity relieve against an unconstitutional tax, the court has refused to exercise that jurisdiction in a number of cases.

Pollock *vs.* Farmers' Loan and Trust Co., 157 U. S., 429, 553.

Jurisdiction exercised to prevent *a threatened breach of trust* in the misapplication of funds of a corporation by illegal payments of an unconstitutional tax out of its capital or profits where the objection to want of adequate remedy at law was not raised below.

Distinguished in Corbus *vs.* Gold Mining Co.

Before a court of equity will in any way help a party to thwart the intent of Congress, as expressed in a statute, *absolute necessity for its interference must exist in order to prevent irreparable injury,* and the fact that this court entertained the bill in equity in Pollock *vs.* Farmers' Loan and Trust Co., 157 U. S., 429, does not determine to what extent

a court of equity will permit a stockholder to maintain a suit nominally against the corporation but really for its benefit.

Corbus *vs.* Gold Mining Co., 187 U. S., 455.

Where an assessment does not constitute a cloud on the title or irreparable injury, and procedure under the statute does not require a multiplicity of suits, and where a remedy at law is given, equity will not take jurisdiction.

Indiana Manufacturing Company *vs.* Koehne, 188 U. S., 681.

In Wilson *vs.* Lambert, 168 U. S., 611, the jurisdiction of equity was asserted on a bill filed against *the commission* under the Rock Creek Park act, seeking to restrain *the commission* from assessing lands of the complainants for any portion of the costs and expenses of locating and improving the Rock Creek Park for the alleged reason that the 6th section of the act under which *the commission* was acting in proposing to make such assessment was unconstitutional and void.

The court said:

> "Courts of equity undoubtedly have jurisdiction to hear complaints of those who assert that their lands are about to be assessed and subjected to liens *by a board or commission* acting in pursuance of the provisions of a statute which has been enacted under the forms of law, but which it is claimed is unconstitutional, and therefore does not avail to confer the powers sought to be exercised."

In concluding the opinion, however, the court said:

> "We adopt the observation made in the dissenting opinion in the Court of Appeals: 'There can be no reason or propriety in appealing to a court of equity *to restrain proceedings that are being conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may*

*arise in the course of the proceeding.* To allow litigations to be thus diverted tends to the multiplication of litigation, and the production of unnecessary delay and expense—to say nothing of the unnecessary vexation to parties.'"

The dissenting opinion referred to will be found in Craighill *vs.* Van Riswich, 8 App. D. C., 185, 222, 225, 227, wherein Chief Justice Alvey held that if the attempted assessment for special benefits is unconstitutional and void no cloud will be cast upon the title as will justify interference of a court of equity, the statute showing on its face it is without force or authority to charge the estate, and concluded with the paragraph above quoted.

A bill in equity to restrain an unconstitutional assessment made *by an equalization board affecting interstate commerce* has been sustained.

Fargo *vs.* Hart, 193 U. S., 490.

The jurisdiction must rest on other grounds than merely the unconstitutionality of the taxes involved, and, therefore, proceedings to collect such void tax cannot be restrained by injunction where irreparable injury or other ground for equitable interposition does not exist.

Shelton *vs.* Platt, 139 U. S., 591.

This doctrine was applied to a case where a sleeping car was seized by the sheriff for the purpose of collecting a tax based on laws of the State of Tennessee claimed to be contrary to the Federal Constitution.

Milwaukee *vs.* Koeffler, 116 U. S., 219.

See also:

Allen *vs.* Pullman's Palace Car Co., 139 U. S., 658.

Pacific Express Co. *vs.* Seibert, 142 U. S., 339.

Arkansas Building and Loan Ass'n *vs.* Madden, 175 U. S., 269.

Dows *vs.* City of Chicago, 11 Wall., 109.

Hannewinkle *vs.* Georgetown, 15 Wall., 547.

For reasons above assigned it is respectfully submitted that this appeal should be dismissed for want of jurisdiction or the judgment of the Court of Appeals of the District of Columbia should be affirmed on the merits.

EDWARD H. THOMAS,
*Corporation Counsel, Attorney for Appellees.*

# BRISCOE *v.* RUDOLPH ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 141. Argued April 25, 1911.—Decided May 29, 1911.

Sections 997 and 1012, Rev. Stat., and Rule 35 of this court, require assignments of error and apply to appeals from courts of the District of Columbia. *Realty Co.* v. *Rudolph*, 217 U. S. 547. An assignment in the brief is not sufficient.

This court, under Rule 21, can and in this case, as the appeal was taken before the decision in *Realty Co.* v. *Rudolph*, will, notice a plain error of fact even if unassigned.

Whether a special assessment for benefits of a street opening is excessive is a question of fact. *English* v. *Arizona*, 214 U. S. 359.

Congress, under its wide legislative power over the District of Columbia, may create a special assessment district and charge a part or all of the cost of a public improvement upon the property therein according to the benefits received.

Where, as in this case, the court is possessed of statutory jurisdiction and all the essential facts appear to have existed, the judgment is no more subject to collateral impeachment than one entered in exercise of general jurisdiction.

Although the court could have, on motion of the dissatisfied owner, set the assessment in a special proceeding aside, and ordered a new trial, if the owner failed to take the proceedings provided by the statute, and the court had jurisdiction of the parties and subject-matter, the judgment cannot be attacked collaterally in a suit to enjoin sale under the judgment of assessment.

The act of February 10, 1899, 30 Stat. 834, c. 150, extending Rhode Island avenue and authorizing assessments for benefits on property within the assessment district created by the act, is not unconstitutional as depriving owners within the district of their property without due process of law either because not providing sufficient notice or as arbitrarily assessing one-half the damages upon property within the designated district.

32 App. D. C. 167, affirmed.

THE facts, which involve the validity of a street opening assessment in the District of Columbia, are stated in the opinion.

*Mr. Samuel Maddox*, with whom *Mr. H. Prescott Gatley* was on the brief, for appellant.

*Mr. E. H. Thomas* for appellees.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a bill filed by a lot-owner whose property was subjected to a special assessment for benefits resulting from the extension of Rhode Island Avenue in the City of Washington. The object of the bill is to vacate the assessment and enjoin the sale about to be made by the Commissioners of the District.

The case was heard upon the bill, answer and an agreed statement of facts, and was dismissed without prejudice, to proceed in the case in which the assessment had been made for cancellation, if so advised.

The proceeding under which the special assessment in question was instituted in March, 1899, was in pursuance of authority conferred by an act of Congress of February 10, 1899, entitled "An act to extend Rhode Island Avenue." 30 Stat. 834, c. 150. That act provided that one-half of the amount awarded as damages should be assessed against the lands within an area described, as benefits, considering the benefits received by each lot within the area. Such assessments were declared a lien on the lots severally assessed and were to be collected as special improvement taxes in five equal instalments, with interest at four per cent until paid. The lot owners were not formally notified, but notice was given by publication to all property owners as required by the statute. Following the act, a jury of seven was appointed, who viewed the property and assessed damages and benefits; the lot owned

by this appellant being assessed for benefits in the sum of one thousand dollars. A rule was then made requiring all persons whose lots had been so assessed to appear and show cause why the verdict of the jury of seven should not be confirmed. The appellant appeared and filed a number of objections, which may be shortly stated as follows:

*a.* That the act of Congress is unconstitutional, as not providing for notice, and as an arbitrary assessment of one-half of the damage upon lots in a designated area.

*b.* That the assessment against the appellant was excessive, unjust, and an unequal apportionment of benefits.

*c.* Want of notice and opportunity to appear and be heard by the court or the said jury of seven and want of notice as to any of the proceedings until cited to show cause why the verdict of the jury should not be confirmed.

These objections were overruled and the verdict and assessment confirmed. This final judgment was on June 27, 1900. Like objections by other lot-owners assessed for benefits were filed and overruled at the same time.

From this action of the Supreme Court of the District an appeal was prayed but never prosecuted. More than two years thereafter the Commissioners advertised the lot and proceeded to sell the same to enforce payment of the whole amount of the assessment. Thereupon this bill was filed.

There is no assignment of errors as required by §§ 997 and 1011, Rev. Stat., and by Rule 35 of this court. These statutes and the rule apply to appeals from the courts of the District of Columbia, as we pointed out in the case of *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547. An assignment in the brief of appellant seems to have been regarded by many members of the District bar as sufficient. That erroneous practice has been followed here, and three errors have been assigned, though in

substance there are but two. One is that the act of February 10, 1899, for the extension of Rhode Island avenue, is unconstitutional. The other is, that the judgment confirming the assessment made by a jury of seven over the objection of the appellant is void, and conferred no authority to enforce by sale the assessment so made.

This appeal was taken prior to the warning contained in the *Columbia Heights Realty Company Case*. For this reason, we shall avail ourselves of the provision in the 21st rule of this court, by which we reserve the right to "notice a plain error," not because we assume the errors assigned in the brief to be "plain," but that questions of such gravity may not be passed without notice, in view of the practice heretofore prevailing in the courts of the District of Columbia.

The objection to the constitutionality of the act of February 10, 1899, 30 Stat. 834, c. 150, as stated in appellant's brief, is, "that it authorizes an assessment of appellant's property to meet the cost of public improvements, in substantial excess of the special benefits conferred by the improvements, and to the extent of such excess confiscates appellant's property to public use without compensation."

If by this it is meant to say that the act upon its face authorizes an assessment for benefits in excess of actual benefits conferred, the objection is not tenable. There is nothing upon the face of the act to indicate that one-half of the damage awarded to those owners whose property is taken for the extension of the street is an amount in substantial excess of the special benefits realized by owners of property in the special improvement district created by the act. If, on the other hand, it is meant that, as matter of fact, the assessment against owners assumed to be benefited is so excessive as compared to actual benefits as to amount to a taking of such excess for public purpose without compensation, then there is no evidence in the

record bearing upon the subject. The question of the excessiveness of a special assessment for benefits resulting from a public street improvement is one of fact. *English* v. *Arizona*, 214 U. S. 359.

That Congress under its wide legislative power over the District of Columbia, may create a special improvement district and charge a part or all of the cost upon the property in that improvement district, can hardly be doubted. It would be but an exercise of the power of taxation for a public purpose in an area carved out for the purpose. In *Webster* v. *Fargo*, 181 U. S. 394, it was held that a State might create such special taxing districts and charge the whole or part of the cost of a local improvement upon the property in the district, either according to valuation, superficial area or frontage. That it is within the power of Congress to create such a special improvement district and charge the cost of an improvement therein according to the benefits received by property within such district, has been more than once affirmed. *Bauman* v. *Ross*, 167 U. S. 548; *Wight* v. *Davidson*, 181 U. S. 371; *Martin* v. *District of Columbia*, 205 U. S. 135; *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547.

When, as under the act for the extension of Rhode Island avenue, only one-half of the cost is to be charged upon lot-owners within the improvement district, and that upon each lot-owner in proportion to the benefit his property has received, the question of whether one such owner has been assessed beyond his proportion is one of fact, and does not touch the validity of the improvement act. This appellant was an owner within the special improvement district. That he was benefited to the extent of one thousand dollars has been determined by the confirmed verdict of the jury which was charged with the duty of proportionately distributing that part of the damages which Congress required to be paid by owners within the improvement district.

The other matter to be noticed is the contention that the sale to enforce the lien of the assessment is under an absolutely void judgment of the Supreme Court of the District of Columbia. The claim is that when the appellant appeared under a citation to show cause why the verdict of the jury of seven should not be confirmed, and filed objections to the verdict, that it was the duty of the court to have ordered a jury of twelve for a reëxamination of the matter. The section under which this contention is made prescribes the method to be pursued for the assessment of damages to land-owners when land is taken or damaged for public roads. If an owner object to the laying out or extension of the road or street and the damages are not agreed upon, a jury of seven is to be empanelled, who are to go upon the premises and assess the damages, and this assessment is to be reduced to writing and signed by the jury, attested by the marshal, returned into court and "recorded."

Section 263 of the Revised Statutes relating to the District of Columbia, provides that "if the authorities or any owner of the land are dissatisfied with the verdict," etc., the marshal shall be ordered to summon a second jury of twelve, who are to give the parties notice and meet on the premises "and proceed as before directed in regard to the first jury."

The exceptions filed by the appellant, and others included in same verdict, have elsewhere been stated. These were overruled and the assessment confirmed as made, and certified for collection. An appeal was prayed and granted, but not prosecuted, because of a stipulation that it should "abide by the decision of the Supreme Court of the United States in the pending case of *Wight* v. *Davidson*," since decided and reported in 181 U. S. 371. That decision was adverse upon every question common to the two cases. After the decision and after the time had elapsed for any error proceeding the Commissioners of the

District proceeded to advertise a sale of the lots so specially assessed for the collection of the amount. Thereupon this bill was filed and the sale has ever since stood enjoined.

*Wight* v. *Davidson* did not present one question which is presented here, namely, that it was the duty of the *nisi prius* court, upon the presentation of the objection which challenged the assessment upon this owner's property by the first jury as excessive, to have at once directed the calling of a second jury, under § 263, Revised Statutes relating to the District of Columbia. It is not necessary to consider the effect of the stipulation to abide by the result of the appeal in that case, as foreclosing the question stated, inasmuch as we are clearly of opinion that the failure of the Supreme Court of the District to order a second jury was at most an error which can only be available in appropriate error proceedings. It is, however, in this connection just to say that the record in the case fails to show that the court was asked for such second jury. The duty, if it existed without such motion, arose from the fact that the exceptions challenging the amount of the assessments, constituted a statement that the owner, within the meaning of § 263, "was dissatisfied with the verdict thus rendered," and therefore entitled without more to another jury. But the court was possessed of jurisdiction over the parties and over the subject-matter. If the owner assessed did not in some way take steps to set aside the first verdict, its confirmation would necessarily be final. If he was denied a second jury, when entitled to it, the court would fall into error; but the order confirming the assessment would not be void. There is no possible ground for upholding the present collateral attack if the order was voidable only.

The court was in the exercise of a special statutory jurisdiction, but all the facts necessary to the exercise of that jurisdiction appear to have existed, and such a judgment

is no more subject to collateral impeachment than if the court had been exercising its general jurisdiction. *Secombe* v. *Railroad Co.*, 23 Wall. 108; *Fauntleroy* v. *Lum*, 210 U. S. 230, 234; *United States, for use, etc.* v. *Morse*, 218 U. S. 493.

We find no error in the decree dismissing the bill for which we should reverse, and the decree is therefore

*Affirmed.*